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No. 00-1517

IN THE

Supreme Court of the United States

THOMAS J. MORIARTY,
Petitioner,

v.

JAMES F. SVEC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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168 pp

QUESTIONS PRESENTED

1. Should the federal single-employer doctrine displace State incorporeal-entity-ownership law so an employer can escape ERISA-delinquent-contribution liability.

2. When attorneys for a prevailing ERISA pension plan charge the plan reduced attorney's fees to advance a social cause, should the district court award that depressed rate or the higher-market rate.

PARTIES TO THE PROCEEDINGS

Petitioner Thomas J. Moriarty is a Trustee of the Local Union No. 727, I.B.T. Pension Trust and the Teamsters Local Union No. 727 Health and Welfare and Pension Fund. Neither employee benefit plan has any parent corporation, subsidiaries, or affiliates that have issued shares to the public.

Respondent James F. Svec owns two Illinois unincorporated businesses—Svec & Sons Funeral Home and West Suburban Livery.

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PETITION FOR A WRIT OF CERTIORARI

Thomas J. Moriarty petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment.

OPINIONS BELOW

The Seventh Circuit's opinions are reported at 233 F.3d 955 and 164 F.3d 323. Pet. App. 3a-47a. The United States District Court for the Northern District of Illinois issued several unreported decisions and orders, and one reported decision at 994 F. Supp. 963. Pet. App. 48a-94a.

JURISDICTION

The court of appeals entered judgment on November 27, 2000. That court denied a timely petition for rehearing and suggestion for rehearing *en banc* on January 3, 2001. Pet. App. 1a-2a. Moriarty invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g)(2), provides in pertinent part:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) or the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

Section 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

Statement of facts

This case involves the lower court's using the single-employer doctrine to create federal-common law to decide who owns an Illinois sole proprietorship so it can escape ERISA delinquent-contribution liability. Although the district court rejected the employer's using that doctrine this way, the Seventh Circuit created a new, revenue-based-federal rule for who owns incorporeal entities.

This case also concerns the court's awarding prevailing pension plans reasonable attorney's fees. Although the plan's attorneys depressed their rates to advance the "union movement," the Seventh Circuit held that they were not entitled to full-market rates unless they first inflated—and then lowered—their rates.

1. *The labor contract, which the Funds interpret as not requiring contributions for "substantial" owners.*

The Funeral Directors Services Association of Greater Chicago—an employer association of funeral homes and livery services—represents its constituents in collective bargaining with I.B.T. Local 727. Pet. App. 95a-96a ¶¶ 1, 4. The 1985-1988 funeral directors' labor contract required Association members to contribute to the Health and Welfare and Pension Funds for their full-time and trainee "employees," a term the contract defined as "[a]ny member of the Union who is in the employ of an employer member who is licensed to and who does embalming and/or funeral directing . . . ." Pet. App. 108a-110a, 122a. But this contract did not require pension contributions during a trainee's first year. Pet. App. 109a.

Besides the contract's express exclusion, the Funds' trustees interpret its requiring contributions for "employees" as excusing owners from contributing for themselves. Pet. App. 96a-97a ¶¶ 9-10. Before 1993, the Fund relieved

"significant" or "substantial" owners from having to contribute, evaluating employers on a case-by-case basis to see if their owners met the significant or substantial threshold. Pet. App. 96a-97a ¶ 9.

2. *Svec & Son Funeral Home and West Suburban Livery.*

James Svec and his sister Sharon own Svec & Sons Funeral Home and West Suburban Livery, which he operates as two sole proprietorships. Pet. App. 9a n.2, 23a, 97a-98a ¶¶ 12-13, 18. Before his death on June 29, 1987, their father—Elmer Svec—owned the Funeral Home, while Elmer and James owned West Suburban. Pet. App. 97a-98a ¶¶ 13, 18.

The Funeral Home was a contributing employer to the Funds; West Suburban was not. Pet. App. 98a ¶ 16. James was a funeral director at the Funeral Home and a Union member. Pet. App. 97a-98a ¶¶ 11, 15.

3. *Svec I holds that the Funeral Home and West Suburban are a "single employer."*

Funds' trustee Moriarty sued James under ERISA to collect delinquent contributions for work: (1) James performed at the Funeral Home; and (2) West Suburban's employees performed.

In *Svec I*, the district court held—and the Seventh Circuit affirmed—that both businesses were a "single employer," making James liable for contributions for West Suburban's employees. Pet. App. 37a-44a, 90a-93a.

4. *James uses the "single employer" doctrine to escape liability for himself.*

On remand from *Svec I*, the parties' dispute focused on James's liability for work he did at the Funeral Home during the six months before his father's death. Although James didn't own the Funeral Home during that time, he asked the district court to use the single-employer doctrine to lump the

Funeral Home and West Suburban's ownership together to make him own both. Owning the integrated enterprise, James reasoned, entitled him to invoke the Funds' substantial owner exception so he could escape ERISA liability.

Although the district court rejected this argument, the Seventh Circuit held that James could use the rule to make himself an owner of the combined Funeral Home/West Suburban integrated enterprise to invoke the Funds' ownership exclusion. Pet. App. 9a-10a, 13a, 62a-63a. The Seventh Circuit directed the district court to measure James's ownership by the Funeral Home and West Suburban's annual revenues; according to the court, this is the standard "the NLRB uses in its applications of the single employer doctrine." Pet. App. 10a.

5. *The lower courts set the market rate for prosecuting ERISA collection cases at the depressed rate counsel charge to advance the union movement.*

After successfully prosecuting this action, Moriarty asked the district court for attorney's fees under 29 U.S.C. § 1132(g)(2)(D). Although his attorneys charged him $165 per hour to subsidize the union movement, Moriarty sought hourly rates between $250 and $345. Pet. App. 123a ¶ 2, 127a ¶ 8, 132a ¶ 2. The district court received evidence showing:

- after successfully defending another funeral home against Moriarty's collection lawsuit, Jenner & Block revealed that they charge employers in the $300/hour range for defending such cases;
- Vedder Price Kaufman & Kammholz bills multi-employer plans between $245 and $310/hour;
- James's attorneys'—Seyfarth Shaw—charged him $270 for a nineteen-year partner and $160 for a third-year associate; and

- two other Chicago union-side law firms charge multiemployer pension plans $160 per hour to advance the union movement.

Pet. App. 126a-127a ¶ 7, 135a ¶ 5, 136 ¶ 5, 137a ¶ 6, 138a ¶ 6, 140a ¶ 4, 142 ¶ 2, 143 ¶ 2.

Although the district court did not question Moriarty's lawyers' altruistic motives in setting their rates, it held that $165 is "the market rate for attorneys prosecuting ERISA collection actions . . . ." Pet. App. 56a. The Seventh Circuit agreed, noting that "[i]f an attorney charges most clients a high fee, and then represents a client pro bono or for a reduced fee, the attorney's presumable market rate in the pro bono or reduced-fee case is still the attorney's normal high rate." Pet. App. 16a. This was not such a case, the court held, because Moriarty's counsel "does not have a high, regular rate from which it deviates to make gifts to unions." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two important, specific ERISA issues: *first*, should federal or State law define who owns an ERISA employer; and *second*, when a pension plan prevails in a delinquent-contribution case, should its attorney's fees be based on its cost—the depressed rate its attorneys charge the plan—or the market rate for similarly situated attorneys.

Although it was not interpreting a federal statute, the Seventh Circuit allowed an employer to use the federal-single-employer doctrine to realign who owns an Illinois sole proprietorship so it could escape ERISA delinquent contribution liability. The Seventh Circuit's using the single-employer rule to trump State incorporeal-entity-ownership law:

- flaunts this Court's precedent—most recently *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-755 (1998)—that federal courts can't create federal-common law from whole cloth;

- conflicts with *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service*, 380 U.S. 255 (1965) on the correct use of the single-employer doctrine; and
- transcends this ERISA delinquent contributions case.

On the second issue, a prevailing pension plan is entitled to "reasonable attorney's fees . . . ." 29 U.S.C. § 1132(g)(2)(D). Although this pension plan's attorneys charge a reduced-hourly fee to advance the "union movement," the Seventh Circuit held they were not entitled to full-market rates because they had never charged those rates. The Seventh Circuit's refusing to award public-spirited attorneys full-market rates:

- directly conflicts with the District of Columbia Circuit's decision in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir.1988) (*en banc*) and its progeny;
- will spill over to other fee-shifting statutes; and
- will produce the anomalous result *Hodel* predicted: either competent, public-spirited counsel will refuse these cases, or will resort to questionable billing practices.

A. Using federal law to alter who owns an Illinois business cannot be reconciled with this Court's holdings that there is no federal-common law.

The first problem with the Seventh Circuit's decision is its erroneously assuming that federal courts are authorized to alter who owns an Illinois sole proprietorship so it can escape ERISA liability. Without a federal statute to interpret—or some federal interest to vindicate—this Court firmly holds that " '[t]here is no federal general common law.' " *Atherton v. FDIC*, 519 U.S. 213, 218 (1997), *quoting*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). And Illinois follows the "well settled" rule "that a sole proprietorship has no legal

identity separate from that of the individual who owns it." *Vernon v. Schuster*, 179 Ill.2d 338, 347, 228 Ill. Dec. 195, 199-200, 688 N.E.2d 1172, 1176-1177 (1997). Under Illinois law, Elmer Svec owned the Funeral Home and his son James did not. The Seventh Circuit should have affirmed the district court's holding that James could not avail himself of the "substantial owner" exception.

When it engaged in the metamorphosis of transforming James Svec from owning none of the Funeral Home to its quarter owner, the Seventh Circuit didn't claim to interpret a federal statute. It identified no federal interest in changing who owns a business entity created under State law, and we can't fathom one. Congress's goal in adding ERISA § 515 was to "permit trustees of plans to recover delinquent contributions efficaciously . . . ." 126 Cong. Rec. 23,038, 23,039 (1980) (Rep. Thompson); Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, at 43-44 (Comm. Print 1980) (herein "Senate Committee Print"). This legislative history shows that Congress sought to curb employers' failing to "make promised contributions in a timely fashion" because the costs associated with collecting them would not only "detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans," but would also harm plans' participants and beneficiaries through "lower benefits," and adversely affect responsible employers through "higher contribution rates . . . ." Using the single-employer doctrine to alter who owns an Illinois business so it can avoid contributing to the Funds defeats—rather than furthers—those interests.

Moreover, there is nothing in the single-employer doctrine that counsels using it to change who owns a business. That rule measures if "nominally separate business entities" are actually one employer because they have interrelated

operations, common management, centralized labor relations, and common ownership. *Radio and Television Broadcast Technicians Local 1264*, 380 U.S. at 256; *see South Prairie Constr. Co. v. Local 627, Int.'l Union of Operating Eng'rs*, 425 U.S. 800 (1976) (*per curiam*); *Vance v. NLRB*, 71 F.3d 486, 490 (4th Cir.1995) (*per curiam*); *Esmark v. NLRB*, 887 F.2d 739, 752-754 (7th Cir.1989); *373-381 South Broadway Assoc.*, 304 NLRB 1108 n. 6 (1991); *Goodman Investment Co., Inc.*, 292 NLRB 340, 347 (1989). But in none of these cases have the courts or Labor Board tampered with the entity's extant ownership infrastructure. In fact, they have held that two entities were not an integrated enterprise even when they shared common ownership. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 583 (7th Cir.1993), *abrogated on other grounds, Papa v. Katy Indus., Inc.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999); *Richmond Convalescent Hospital, Inc.*, 313 NLRB 1247, 1249-1250 (1994).

Of course, this would be a different case if the Seventh Circuit had interpreted who is the "employer" under ERISA § 515. That would not be "federal common law in 'the strictest sense, *i.e.*, a rule of decision that amounts to, not simply to an interpretation of a federal statute . . ., but, rather, to the judicial 'creation' of a special federal rule of decision.' " *Burlington Indus., Inc.*, 524 U.S. at 755, *quoting*, *Atherton*, 519 U.S. at 218. When Congress wants federal courts to tinker with who owns incorporeal abstractions, it does so expressly, allowing the courts to flesh out the statutory gaps with federal-common law. 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a); *see United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 123-124 (3rd Cir.1986); *PBGC v. Ouimet Corp.*, 711 F.2d 1085, 1094 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983). But the Seventh Circuit did not decide who the statutory employer is; it ruled

who owns that employer using a federal standard. Pet. App. 9a-10a, 13a.

If this were only a dispute over this employer's need to contribute to this Fund under ERISA, the court's error might not merit review. After all, James will surely point out that the contributions the Funeral Home might owe for his work are $2,389. Pet. App. 49a ¶¶ A & B. But this issue's significance transcends this statute and these parties. The tension over choosing federal or State law to define who owns otherwise-state-governed entities generates "significant disagreement among courts and commentators . . ." in such substantive areas as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498-1503 (11th Cir.1996). The Seventh Circuit's supplanting State law to resolve this case doesn't respect this Court's admonishing lower courts that instances when federal-common law should displace its State counterpart are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

Moreover, important issues—requiring this Court's decision—don't necessarily involve high monetary stakes. *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniel v. Williams*, 474 U.S. 327, 329-331 (1986). And focusing exclusively on the delinquent contributions is deceptive: the Seventh Circuit held that the Funds won't be allowed any attorneys' fees if James prevails on this issue. Pet. App. 12a-14a.

Finally, this case's importance is reflected in the fact that it has gained national attention in the funeral-home industry. *Court says principal owner not an employee*, 5 Death Care Business Advisor No. 11 (LRP Publications Dec. 13, 2000), available in LEXIS, Nexis Library, Newsletter Stories file. Because the industry recognizes that the issue is not limited to

one Chicago funeral home, we believe it appropriate for this Court to grant certiorari to address it.

B. The Seventh Circuit's relegating prevailing pension plans to the depressed hourly rate their attorneys charge based on ideological reasons conflicts with the District of Columbia Circuit.

The second problem with the Seventh Circuit's decision is that it equates the market rate for awarding attorney's fees with the Funds' cost, even though their attorneys set those fees at a depressed rate for altruistic reasons. Pet. App. 16a, 123a ¶ 2, 132a ¶ 2. The court set the market rate at this level, despite the fact that:

- employers pay their Chicago law firms attorney's fees in the $300/hour range to defend the Funds' lawsuits; and
- Chicago attorneys that don't base their rates on ideological goals charge the same rates as employer firms.

Pet. App. 126a-127a ¶ 7, 135a ¶ 5, 140a ¶ 4.

The court reasoned that the Funds' counsel "does not have a high, regular rate from which it deviates to make gifts to unions." Pet. App. 16a. This decision is squarely contrary to the District of Columbia's rule that public-spirited attorneys—including those who prosecute ERISA delinquent-contributions cases—who depress their rates to advance social causes are entitled to full-market rates rather than the depressed rates they charge their clients. *Board of Trustees of Hotel & Restaurant Employees Local 25 Health and Welfare Fund v. JPR, Inc.*, 136 F.3d 794, 807 (D.C. Cir.1998); *Covington v. District of Columbia*, 57 F.3d 1101, 1108 (D.C. Cir.1995), *cert. denied*, 516 U.S. 1115 (1996); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir.1988) (*en banc*).

The District of Columbia Circuit's rule is consistent with the courts recognizing "that the *prevailing market rate* and not the *cost* of providing legal services is the measure of a 'reasonable attorney's fee' " under fee-shifting statutes. *Beard v. Teska*, 31 F.3d 942, 956 (10th Cir.1994) (emphasis in original); *accord Buffington v. Baltimore County*, 913 F.2d 113, 129-130 (4th Cir.1990), *cert. denied*, 499 U.S. 906 (1991); *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1161 (8th Cir.1985), *cert. denied*, 475 U.S. 1011 (1986); *McCann v. Couglin*, 698 F.2d 112, 130 (2nd Cir.1983).

The District of Columbia's rule is not without controversy. Each decision drew published dissents, questioning a standard that awards prevailing parties' counsel more than they actually charge their clients. *JPR, Inc.*, 136 F.3d at 809-810 (Randolph, J., dissenting); *Covington*, 57 F.3d at 1112-1115 (Henderson, J., dissenting); *Hodel*, 857 F.2d at 1525-1534 (Starr, J., dissenting); *see* Andrew P. Sutor, IV, Note, *Covington v. District of Columbia: Judicial clouding of a once clear burden of proof in awards of attorney fees under 42 U.S.C. § 1988*, 41 Vill. L. Rev. 825, 859-864 (1996). The Seventh Circuit sided with the District of Columbia's dissenting judges that unless counsel charge premium rates, their clients are never entitled to full-market rates. Pet. App. 16a. The lines are thus drawn for this Court's authoritative resolution.

Under the Seventh Circuit's rule, only large law firms charging premium rates will be able to recover those rates from delinquent employers. But as Judge Frank Easterbrook noted in *Barrow v. Falck*, 977 F.2d 1100, 1105 (7th Cir.1992), "[s]ome lawyers dedicate their professional lives to causes they find admirable and worthy of support—to legal services for the poor, to the representation of unions. These lawyers are making contributions to their favorite causes, not in money but in time."

The Seventh Circuit's standard will produce the anomalous results *Save Our Cumberland Mountains, Inc. v. Hodel* predicted: either competent, public-spirited counsel will refuse these cases or will resort to questionable billing practices:

> Thus, the practitioner outside the large or established firm may either eschew pro bono representation, directing those potential clients . . . to the established firm or legal aid societies if either of those entities is available and willing to undertake the representation, or quote fictitious but market-based rates, which neither he nor the client have any intention of actually seeing collected *in toto* unless court-awarded fees are ultimately available.

Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d at 1520.

The Seventh Circuit's standard can't be reconciled with this Court's precedent that under fee-shifting statutes, legal services should be valued at their market value, regardless of the attorney-client billing arrangements. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); *Blum v. Stenson*, 465 U.S. 886, 893-896 (1984). Relegating pension plans to the depressed actual rates their attorneys charge is also inconsistent with Congress's goals in enacting ERISA's 1980 amendments. The legislative history to these amendments shows that the legislature sought to "discourage delinquencies" by making collection less "cumbersome and costly." Senate Committee Print at 44. To that end, Congress in ERISA § 502(g)(2)(D) provided that courts "shall" award attorney's fees to prevailing pension plans. 29 U.S.C. § 1132(g)(2)(D). There is no mandatory fee provision for prevailing employers.

From this statutory structure and legislative history, the District of Columbia Circuit held that "[i]f an attorney has made a public-spirited decision to charge a plan a discounted

rate, a delinquent employer should not receive the benefit of this decision." *JPR, Inc.*, 136 F.3d at 805.

Finally, the Seventh Circuit's standard—limiting pension plans to their actual costs—transcends this ERISA context. Although the court recognized that ERISA § 502(g)(2) does not use the phrase "prevailing party," it held that "case law regarding prevailing parties is applicable to this section of ERISA." Pet. App. 17a n.4. Because similarly worded fee-shifting statutes should be similarly construed—in the absence of contrary legislative intent—the Seventh Circuit's standard will infect the hundreds of such statutes. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-525 (1994); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986). Because the Seventh Circuit's standard has potentially sweeping implications that will eviscerate Congress's fee-shifting goals, we ask this Court to grant review.

CONCLUSION

The Seventh Circuit's displacing State-law ownership rules for incorporeal entities stands in marked contrast to this Court's refusing to create federal-common law in areas the States have traditionally regulated. It allows employers to use the single-employer doctrine as a shield to avoid contributing to multiemployer plans, generating all the evils Congress tackled when it enacted ERISA's 1980 amendments.

The court's standard for prevailing pension plan's attorney's fees similarly defeats Congress's goals of promoting plans' collecting delinquent contributions "efficaciously," and cannot be reconciled with the District of Columbia's precedent. This Court should grant certiorari to resolve these issues, vacate the Seventh Circuit's judgment, and remand to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

January 3, 2001

Hon. JOEL M. FLAUM, Chief Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

No. 99-4266 & 99-4285 (cons.)

THOMAS J. MORIARTY, Trustee on behalf of the Trustees of the Local Union No. 727, I.B.T. Pension Trust, and the Trustees of the Teamsters Local Union No. 727 Health and Welfare Trust,

Plaintiff-Appellee/Cross-Appellant,

v.

JAMES F. SVEC, individually and d/b/a SVEC & SONS FUNERAL HOME and WEST SUBURBAN LIVERY,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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No. 96 C 7392
George W. Lindberg, *Judge*.

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on December 11, 2000 by plaintiff-appellee, no judge in active

service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-4266 & 99-4285

THOMAS J. MORIARTY, Trustee on behalf of the Trustees of the Local Union No. 727, I.B.T. Pension Trust, and the Trustees of the Teamsters Local Union No. 727 Health and Welfare Trust,

Plaintiff-Appellee/Cross-Appellant,

v.

JAMES F. SVEC, individually and d/b/a SVEC & SONS FUNERAL HOME and WEST SUBURBAN LIVERY,

Defendant-Appellant/Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 96 C 7392—George W. Lindberg, Judge.

Argued October 24, 2000—Decided November 27, 2000

Before FLAUM, Chief Judge, and MANION and EVANS, Circuit Judges.

FLAUM, Chief Judge. In this successive appeal, James F. Svec, now a half-owner of Svec & Sons Funeral Home ("Home") and majority owner of West Suburban Livery ("WSL"), two sole proprietorships, challenges the district court's determination that Home owes contributions on his behalf to a pension fund and a health and welfare fund, both of which have plaintiff Thomas J. Moriarty on their respective boards of trustees. In addition, both James and

Moriarty appeal the amount of attorney's fees awarded to Moriarty. For the reasons stated herein, we vacate and remand for further consideration.

I. Background

The facts of this dispute that occurred prior to 1999 are recounted in the first decision regarding this case, *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998), and will be restated here only to the extent necessary. James's father Elmer was the sole owner of Home and half-owner of WSL until his death on June 29, 1987. James owned the other half of WSL and worked as a funeral director for Home. Home, as part of the Funeral Directors Services Association of Greater Chicago ("FDSA"), was bound by a collective bargaining agreement ("CBA"). The CBA required Home to make contributions on behalf of its employees, including funeral directors, to a pension fund and a health and welfare fund until the end of 1995, when James caused Home to withdraw from the FDSA. In 1997, after an audit of Home and WSL, Moriarty sued on behalf of these funds to recover contributions that WSL allegedly owed on behalf of its employees ("Claim I") and Home supposedly owed on behalf of James ("Claim II"). Moriarty employed (and continues to employ) the law firm of Jacob, Burns, Orlove, Stanton & Hernandez ("Jacob, Burns") to litigate against James. Moriarty acknowledges that under the CBA contributions are not required for principal owners. After some preliminary investigation, Moriarty believed that James became the principal owner of Home on April 15, 1993. Moriarty then sought contributions in the amounts of $17,802.50 for Claim I for the period from October 1993 to December 1995 and $32,727.00 for Claim II for the period from January 1987 to April 1993, for a total of $50,529.50.

James argued that Home did not owe contributions on his behalf because he was a principal owner of Home. James also claimed that WSL was not a signatory to the CBA and so no contributions were owed for its employees. The district court

decided in favor of Moriarty on February 23, 1998. In its first decision in this case, the district court held that the CBA is unambiguous and that James was an employee of Home for purposes of the CBA, regardless of his ownership status, because he is a funeral director. Thus, Home owed contributions on his behalf. The lower court also used the "single employer" doctrine to find that WSL and Home were a single organization for purposes of the CBA. Because Home was bound by the CBA, WSL was as well and so contributions were owed for WSL's employees.

The district court also awarded attorney's fees, as required by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g)(2)(D), in cases where a plan fiduciary successfully recovers delinquent contributions. Moriarty requested hourly rates of $225 and $200 for Jacob, Burns, which claimed its rates were depressed due to the firm's dedication to the labor movement. Moriarty apparently did not inform the district court of the rate Jacob, Burns actually charged. James challenged these rates, but likewise did not submit evidence of Jacob, Burns's actual billing rates to the court. The district court used the rates requested by Moriarty in entering a judgment that included $120,928.48 in attorney's fees.

James appealed. This court rejected James's claim that the National Labor Relations Board ("NLRB") has exclusive jurisdiction to determine whether Home and WSL should be treated as a single employer and affirmed the district court's holding that WSL and Home should be considered a single organization for purposes of the CBA. 164 F.3d at 332-35. However, the lower court's holding that the CBA is unambiguous was reversed, and we remanded to the district court to receive extrinsic evidence on how the term "employee" in the CBA should be interpreted. *Id.* at 329-32. Regarding attorney's fees, the opinion notes James's objections and states "While we realize that this award may

have to be adjusted on remand to reflect any additional proceedings, we see no error in any of the cost and fee calculations the court has already ordered." *Id.* at 327 n.3.

On remand, the district court found that the term "employee" in the CBA excludes principal owners from its definition. The court further found that James became a principal owner of Home on June 29, 1987, and so Moriarty could not recover for Claim II after that date. However, the court ruled in Moriarty's favor on Claim II for the period from January 1, 1987 to June 29, 1987. James argued that he was not an employee during this truncated time period, claiming that the single employer doctrine and the Labor Management Relations Act ("LMRA"), which excludes the children of employers from its definition of "employee," 29 U.S.C. § 152(3), should be used to interpret the CBA. However, the district court rejected these contentions. Because Moriarty's success on Claim II covered a much shorter period of time than it did after the district court's first decision, the court reduced Moriarty's recovery on this claim from $32,727.00 to $2,389.00.

Moriarty requested attorney's fees for the period following the district court's first decision, while James asked that the court reduce the fees Moriarty had already been awarded and challenged Moriarty's request for additional fees. The district court used the date of its first decision to divide the case into two phases: the first from August 1995 until February 23, 1998 ("Phase I"), and the second from February 24, 1998 until the present ("Phase II"). James argued that the district court's prior Phase I award, which was based on Moriarty recovering over $32,000 for Claim II, should be reduced to reflect Moriarty's lack of success. The district court agreed and divided the Phase I award in half, with one half representing the time spent on Claim I and the other half representing the time spent on Claim II. The court then reduced the amount of the Phase I recovery on Claim II to ten

percent, in order to reflect Moriarty's "extremely limited success" on this claim. Thus, the district court awarded Moriarty attorney's fees of $66,511.32 for Phase I, or fifty-five percent of the original award.

Moriarty requested 418.7 hours of attorney time at rates of $315 and $345 for Phase II. James, now armed with the knowledge that Jacob, Burns actually charged Moriarty $165, challenged Moriarty's request on a variety of grounds. James also produced evidence that two other firms that prosecute ERISA collection cases for unions charge $160. The district court decided that $165 was the market rate for prosecuting ERISA collection actions, and based its award on that amount. The court also stated that Moriarty was not entitled to time spent during Phase II litigating the issue of when James became the Funeral Home's owner because James "prevailed" on these "claims" rather than Moriarty. The court then awarded $60,000 for Phase II, indicating that the court credited Jacob, Burns with 363.6 hours. Both parties appeal the attorney's fee awards, and James also appeals the finding that Home is liable on Claim II.

II. Discussion

A. Home's Contributions on Behalf of James

James has two arguments as to why he was not an employee of Home during the first half of 1987.[1] The first is that the definition of employee used in LMRA, which excludes the children of employers, should be used to interpret the CBA. The second is that judicial estoppel

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[1] In addition, James continues to argue that exclusive jurisdiction to decide Claim I is vested in the NLRB. James does not bring any new theories, but continues to argue the same ones that we considered in the first case. We rejected James's argument in our initial decision, 164 F.3d at 334, and James's attempt to resurrect it without good reason is barred by the law of the case. *See Blue Cross and Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir. 1998).

requires that the single employer doctrine be used to determine whether he was a principal owner of the Home/WSL combination.

1. LMRA definition.

The LMRA provides that, for purposes of determining an appropriate bargaining unit "any individual employed by his parent or spouse" is not included within the definition of "employee." 29 U.S.C. § 152(3). ERISA's definition of employee is "any individual employed by an employer." 29 U.S.C. § 1002(6). James claims that LMRA's definition of "employee" should be used to interpret the CBA rather than ERISA's because ERISA was not passed until well after the trust agreements creating the funds were formed, which was in 1961 and 1963. The district court relied on the ERISA definition and the CBA's explicit exclusion of trainees but not children of employers in determining that such children were employees on whose behalf contributions are owed. We review the district court's interpretation of pension plan terms de novo. *Moriarty*, 164 F.3d at 330.

We agree with the district court that the definition contained in 29 U.S.C. § 152(3) should not be used to interpret the CBA. Even assuming without deciding that LMRA rather than ERISA should be used to interpret the CBA, James's argument that he is not an employee because he was Elmer's son would not succeed. Within LMRA itself, the definition of "employee" is broader than that contained in § 152(3) when determining whether an employer may make payments to workers by means of a trust fund under § 186(c)(5). *See Reiherzer v. Shannon*, 581 F.2d 1266, 1276 (7th Cir. 1978), *abrogated in other part by Black v. TIC Inv. Corp.*, 900 F.2d 112 (7th Cir. 1990). For example, retired workers are not "employees" for purposes of § 152(3) but are "employees" under § 186(c)(5). *See Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971). The portion of the CBA about which James

is arguing concerns a trust fund, and so the broader definition of § 186(c)(5) should be used to interpret the CBA rather than § 152(3). Whether children of employers would be considered "employees" for purposes of § 186(c)(5) is unclear. Thus, LMRA does not support James's construction of "employee" in the CBA.

2. Judicial estoppel.

The doctrine of judicial estoppel provides that when a party prevails on one legal or factual ground in a lawsuit, that party cannot later repudiate that ground in further litigation based on the same underlying facts. *See Menominee Indian Tribe of Wisc. v. Thompson*, 161 F.3d 449, 454 (7th Cir.1998); *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998). Moriarty prevailed on Claim I by using the "single employer" doctrine, which provides that when two entities [2] are sufficiently integrated these will be treated as a single entity for certain purposes. *See Moriarty*, 164 F.3d at 332. Moriarty successfully argued that Home and WSL are a single organization such that the employees of WSL would be considered the employees of Home for purposes of contributions to the funds under the CBA. Thus, James is correct that Moriarty is now estopped from arguing that the single employer doctrine cannot be applied in determining whether James is an employee of Home.

Both James and Moriarty agree that a "principal owner" rule applies to interpret the CBA, under which those who work at one of the firms within the FDSA are not considered employees for purposes of the CBA if they own a certain percentage of the firm. Because of his half-ownership in

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[2] We note, as we did in our first decision, 164 F.3d at 331 n.7, that Home and WSL are sole proprietorships, and are not legal entities distinct from their owner, James, in the way that properly formed corporations are. We use the word "entity" when explaining the single employer doctrine only because this is the language in which the doctrine is normally formulated.

WSL, James could not have been considered an employee of WSL under the principal owner rule. In the current litigation, employees of WSL and Home are considered to be the employees of a combined Home/WSL organization for purposes of the contributions required under the CBA. A nominal employee of Home/WSL is entitled to show that his or her ownership of WSL or Home translates to sufficient ownership of the Home/WSL organization such that the principal owner rule applies and he or she is not considered an employee for purposes of the CBA. Thus, the lower court erred in not taking account of James's partial ownership of this combined Home/WSL organization through his ownership of WSL in determining whether he is an employee of the Home part of this combined entity such that Home owes contributions on his behalf.

However, two factual questions prevent this court from determining whether James should prevail on Claim II. The first involves the percentage of the Home/WSL combination that James owned. James claims that because he owned half of WSL and there are two entities in this combination, James owned one quarter of Home/WSL during the relevant time period. However, this is not necessarily correct; WSL may have been much smaller than Home, such that James's half-ownership of WSL amounted to owning only a tiny fraction of Home/WSL. We remand to the district court to determine the relative sizes of Home and WSL during the first half of 1987 and thus what percentage of Home/WSL James owned by his half-ownership of WSL. In calculating these sizes, the district court should be guided by the annual revenues of Home and WSL, which is what the NLRB uses in its applications of the single employer doctrine. *See Goodman Investment Co.*, 292 N.L.R.B. 340, 347-48 (1989). The second factual question concerns what percentage of ownership is necessary before James is considered a principal owner under the CBA. James claims that ten percent

ownership is sufficient, but Moriarty has an opportunity on remand to show that this figure is incorrect.

B. Attorney's Fees

Both parties challenge the amount of attorney's fees awarded to Moriarty in this case. ERISA provides for a mandatory award of reasonable attorney's fees when a plan fiduciary prevails in an action to collect delinquent contributions. 29 U.S.C. § 1132(g)(2)(D). A district court generally has wide discretion in determining a reasonable attorney's fee award, and we review only for abuse. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, when fees are adjusted because of a principle of law our review is *de novo*. *See Jaffee v. Redmond*, 142 F.3d 409, 412-13 (7th Cir. 1998).

1. Phase I.

James claims that the approximately $66,000 awarded to Moriarty for Phase I is unreasonable. Moriarty claims that the lower court made legal errors in reducing the Phase I award from approximately $120,000 to $66,000 on remand because of Moriarty's reduced success on Claim II. We conclude that the district court did not err in determining the amount of the Phase I award, though an adjustment may have to be made depending on the resolution of Claim II on remand.

James's argument can be disposed of quickly. James raised certain objections to the Phase I award when this case first appeared before this court.[3] 164 F.3d at 327 n.3. We rejected his contentions, and since James has not provided any good reason for reconsidering our determination, these objections

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[3] These objections were that the district court incorrectly awarded Moriarty attorney's fees for: time spent preparing for a trial that did not occur; pursuing claims against James's sister Sharon who was eventually dropped from the lawsuit; awarding a Jacob, Burns associate the same amount as more experienced attorneys.

are barred by the law of the case doctrine. *See Blue Cross and Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir. 1998). Any of James's remaining claims against the Phase I award should have been brought during the prior appeal, and James has forfeited these by failing to do so. *See Gibson v. West*, 201 F.3d 990, 992 (7th Cir. 2000)

Some of Moriarty's objections require more sustained analysis. Moriarty's first claim is that any reduction in the Phase I fees is prohibited by language in the first opinion of this court, which states that "we see no error in any of the cost and fee calculations the court has already ordered." 164 F.3d at 327 n.3. However, immediately preceding this phrase the opinion states that "we realize that this award may have to be adjusted on remand to reflect any additional proceedings." *Id.* This language plainly demonstrates that we did not freeze the amount of the Phase I award but rather explicitly invited the district court to adjust it in accord with subsequent proceedings. After conducting further proceedings, the lower court determined that Moriarty's success on Claim II was much less than when it had made the award, and so adjusted the award accordingly. The district court did not violate the law of the case in making such an adjustment.

Moriarty next argues that Claim I and Claim II are intertwined, such that the attorney's fees awarded for the whole action should not have been reduced because of a lack of success regarding Claim II. Moriarty claims that *Jaffee*, 142 F.3d at 414, supports his argument and that we should review the district court's decision *de novo*, but he is incorrect on both counts and his argument fails for two independent reasons.

First, Claim I and Claim II are not related for purposes of *Jaffee* or *Hensley*, 461 U.S. at 435. *Jaffee* holds that where a party presents multiple claims for relief based on a common core of facts or related legal theories, no legal bar exists against awarding attorney's fees for time spent on rejected

claims. 142 F.3d at 413. As presented by Moriarty, Claim I relies on the facts that Home is covered by the CBA, WSL and Home are integrated enterprises, and the legal theory that WSL and Home are a single employer. Claim II relies on the facts that James worked at Home as a funeral director, the CBA requires contributions on behalf of Home employees, and the mixed question of law and fact as to whether James was a principal owner of Home through his ownership of WSL. The mere circumstance that both of these claims depend on Home being covered by the CBA is not sufficient to make these interrelated. No dispute existed regarding Claim I as to whether Home was covered by the CBA. For Claim II, the main questions were whether the principal owner rule, which was not an issue in Claim I, should be applied to the CBA and when James became such an owner. Thus, none of the time spent litigating Claim II would have aided Moriarty in prevailing on Claim I. Therefore, these two claims are distinct, such that if Moriarty loses on Claim II, no attorney's fees could be rewarded for that claim as a matter of law. *See Hensley*, 461 U.S. at 434-35; *Jaffee*, 142 F.3d at 413. Because these two claims are discrete, Moriarty cannot leverage his success on Claim I into success on Claim II. Thus, since Moriarty achieved significantly worse results regarding Claim II on remand, the district court did not abuse its discretion in reducing the Phase I award for that claim.

Second, even if these two claims were related, the district court did not rule as a matter of law that attorney's fees could not be awarded for Claim II, as the lower court in *Jaffee* did, 142 F.3d at 413, but rather exercised its discretion in reducing the attorney's fees for Claim II. Unlike in *Jaffee*, the district court here did in fact award attorney's fees to Moriarty for Claim II. However, the district court exercised its discretion in reducing the Phase I award because of Moriarty's limited success on that claim. Where the prevailing party has achieved only limited success, the standard lodestar method

may yield an excessive award and the district court may reduce the lodestar result. *See Hensley*, 461 U.S. at 436.

Moriarty's final argument is that James withheld evidence of when he became the owner of Home, causing the litigation to be prolonged unnecessarily. Moriarty claims that the Phase I award should not have been reduced because of James's tactics. However, the parties fiercely dispute whether Moriarty knew or should have known that James became the owner of Home on June 29, 1987. James claims that he gave Moriarty copies of Illinois state court probate documents, which conclusively establish when James became the owner of Home, and that Moriarty incurred fees attempting an impermissible collateral attack on the probate court's judgment. Such contested issues of facts are left to the district court. The district court's reduction in the Phase I award indicates that it found that James did not improperly prolong the litigation, and this finding is not clearly erroneous. In sum, the district court did not abuse its discretion in reducing the Phase I award to reflect Moriarty's lack of success on Claim II.

All of the challenges of both parties to the Phase I award have been considered and rejected. Any objections to this award that we have not considered are forfeited. On remand, absent a reason that justifies changing the law of the case, the Phase I award should not be disturbed if Moriarty prevails on Claim II. If James prevails on Claim II, then, as noted above, Moriarty cannot recover attorney's fees for Claim II as a matter of law, and the district court must reduce the Phase I award accordingly.

2. Phase II.

Both parties bring myriad challenges to the Phase II attorney's fee order. The district court's order awarding Phase II fees is terse, but provides sufficient explanation for most of the lower court's determinations. We find no error in the

explanations that are provided in this order. However, because we cannot be certain that the district court considered specific significant objections made by James, we vacate the award and remand to the district court. *See Hensley*, 461 U.S. at 437.

a) Phase II attorney's fee order.

The district court entered an order regarding attorney's fees on October 29, 1999 that dealt with the Phase II award. In this order, the court stated that the evidence the parties provided to it shows that $165 is the market rate for "attorneys prosecuting ERISA collection actions." The court also stated that Moriarty could not recover the time he spent during Phase II litigating over when James became Home's owner, because James "prevailed" on that "claim." Moriarty argues that $165 (the rate Jacob, Burns actually charged him) is too low because the district court awarded Moriarty a higher rate for Phase I and Jacob, Burns artificially deflates its rate to favor the labor movement. He also claims that the lower court erred by focusing on only the plaintiff's side of ERISA litigation rather than defense and plaintiff's attorneys as a whole. Finally, he contends that the hours he requested should not have been reduced because of whatever success James may have had on Claim II.

Given the evidence before it, the district court did not abuse its discretion in deciding that $165 is the hourly rate for Jacob, Burns's work. James produced evidence that two other firms charge multiemployer union pension plans $160 per hour. More importantly, Jacob, Burns charges between $150 and $200 for all of its clients, and charged Moriarty a rate of $165. The lawyer's regular rate is strongly presumed to be the market rate for his or her services. *See Central States Pension Fund v. Central Cartage Co.*, 76 F.3d 114, 116-17 (7th Cir. 1996); *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993).

Jacob, Burns's claim that it and the two other union firms charge less than their market rate is unavailing. If an attorney charges most clients a high fee, and then represents a client pro bono or for a reduced fee, that attorney's presumable market rate in the pro bono or reduced-fee case is still the attorney's normal high rate. *See Central Cartage*, 76 F.3d at 117, *Gusman*, 986 F.2d at 1150-51. Jacob, Burns's case differs because it does not have a high, regular rate from which it deviates to make gifts to unions. James produced evidence that Jacob, Burns's rate to all clients in the various litigation that it undertakes is between $150 and $200 per hour; this is the firm's presumptive market rate. *See Central Cartage*, 76 F.3d at 117 ("[T]he union's lawyer had a low rate for everything; that normal rate, we held, is the market rate."). James also produced the similar rates of two other firms that engage in the same kinds of litigation as Jacob, Burns, further supporting his claim that Jacob, Burns's market rate is $165. Moriarty cites the claims of Jacob, Burns and the two other union firms that all of their market rates are depressed because of their dedication to the labor movement. However, the district court was not required to credit these assertions in the face of their actual market rates for all of their clients.

The district court's award of lower rates for Phase II than Phase I was likewise not an abuse of discretion. James produced more evidence for the Phase II attorney's fee hearing, including Jacob, Burns's actual billing rates and the rates of the other two union ERISA firms, than he had done at the Phase I hearing. The district court could rely on such new evidence in determining that Jacob, Burns's rate was actually lower than what the court had awarded for Phase I.

Moriarty's claim that the district court erred by focusing only on firms that prosecute ERISA collection actions is similarly unsuccessful. The district court's discretion in determining what is a reasonable attorney's fee applies to its determination of what constitutes a market. Attorneys who

specialize in a specific area of litigation may be paid more or less than lawyers who work in related areas of the law. Similarly, certain kinds of litigation defense attorneys may make more than plaintiff's lawyers or vice versa. Basing fee awards on such distinctions, as long as these are reasonable and supported by the record, are left to the sound discretion of the district court. Given the evidence presented to the district court, we do not find an abuse of discretion in determining that Jacob, Burns was in a market composed of firms prosecuting ERISA collection actions.

We also reject Moriarty's final objection, that the district court erred by reducing the attorney's fees because James "prevailed" on the "claims" of when James became Home's owner. While the fee order's language is imprecise, the district court did not abuse its discretion. At the time of this order, Moriarty had been awarded judgment on Claim II for approximately $2,400. This award means that Moriarty was still the prevailing party [4] on Claim II, *see Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (holding that a plaintiff who wins any measure of damages is a prevailing party for the purposes of fee-shifting statutes) and was entitled to reasonable fees under 29 U.S.C. § 1132(g)(2)(D). We do not read the district court's order to state that Moriarty was not a prevailing party on Claim II at the time of the order. The district court reduced the hours claimed by Moriarty from 418.7 to 363.6, a decrease of approximately only thirteen percent. Given that the district court apportioned Jacob, Burns's time evenly between Claims I and II in reducing the Phase I award, and that the district court could not have

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[4] Unlike many other fee-shifting statutes, 29 U.S.C. § 1132(g)(2) does not use the term "prevailing party," but rather speaks of when "judgment in favor of the plan is awarded." Because Congress used the latter language only to specify that a pension plan, and not a participant or beneficiary, can take advantage of 29 U.S.C. § 1132(g)(2), case law regarding prevailing parties is applicable to this section of ERISA.

awarded any hours on Claim II if James was the prevailing party (as explained above), the district court was only reducing the hours claimed by Moriarty because of a lack of success rather than stating that Moriarty had not prevailed on Claim II. The district court did not abuse its discretion in making such a reduction given Moriarty's limited success on Claim II at the time of the fee order.

b) Settlement offer.

James claims that he made a settlement offer of $43,000 on December 30, 1997.[5] Moriarty contends that James did not comply with the technical requirements of Fed.R.Civ. P. 68, but appears to acknowledge that James did in fact make a settlement offer for $43,000 that was rejected by Moriarty. The district court's Phase II fee order does not mention this attempted settlement.

Substantial settlement offers should be considered by the district court as a factor in determining an award of reasonable attorney's fees, even where Rule 68 does not apply. *See Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1337 (4th Cir. 1996). Attorney's fees accumulated after a party rejects a substantial offer provide minimal benefit to the prevailing party, and thus a reasonable attorney's fee may be less than the lodestar calculation. *See Marek v. Chesny*, 473 U.S. 1, 11 (1985). Determining whether an offer is substantial is left in the first instance to the discretion of the district court. Nevertheless, an offer is substantial if, as in this case, the offered amount appears to be roughly equal to or more than the total damages recovered by the prevailing party. In such circumstances, a district court

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[5] While James refers to this offer in his brief as a Fed.R.Civ.P. 68 offer of judgment, whether he intends to claim that his settlement offer complied with that Rule is unclear. Further, he does not develop an argument based on Rule 68, and thus we consider his objection to the district court's fee order as involving only the lower court's apparent failure to consider a substantial offer of settlement.

should reflect on whether to award only a percentage (including zero percent) of the attorney's fees that were incurred after the date of the settlement offer.

The district court must only consider the substantial settlement offer; it need not reduce the lodestar calculation because of the offer. We stress that a substantial offer is only one of the factors that a district court should evaluate in making an attorney's fee award, and (absent an offer complying with Rule 68 where that Rule applies) is not necessarily determinative. The district court may evaluate the settlement offer and decide that under the circumstances of a particular case an unadjusted lodestar method still provides a reasonable attorney's fee. However, because the Phase II fee order does not mention James's offer and so we cannot determine whether it was a factor in the award, we remand to the district court to consider the settlement offer in determining a reasonable Phase II attorney's fee. *See Fleming v. County of Kane*, 898 F.2d 553, 563-64 (7th Cir. 1990).

c) Proportionality.

James claims that the Phase II fees awarded are unreasonable because these are disproportionately large compared to the amount of damages claimed and the amount of damages actually recovered by Moriarty. We have not formulated any mechanical rules requiring that a reasonable attorney's fee be no greater than some multiple of the damages claimed or recovered. *See Connolly v. National Sch. Bus Serv., Inc.*, 177 F.3d 593, 597 (7th Cir. 1998). However, proportionality concerns are a factor in determining what a reasonable attorney's fee is. *See City of Riverside v. Rivera*, 477 U.S. 561, 585-86 & n.3 (1986) (opinion of Powell, J.); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 625-26 (7th Cir. 2000); *Cole v. Wodziak*, 169 F.3d 486, 488 (7th Cir. 1999).

The Phase II fee order does not provide any indication that proportionality concerns were considered in determining the attorney's fees awarded in this case, despite the size of the total amount of attorney's fees compared to the amount of damages claimed and the amount of damages recovered by Moriarty. While such disproportionality is not determinative and this court has approved attorney's fees many times the amount of damages recovered, *see Connolly*, 177 F.3d at 597, the district court's fee order should evidence increased reflection before awarding attorney's fees that are large multiples of the damages recovered or multiples of the damages claimed.[6] Because the Phase II fee order does not provide any indication that these concerns were factored into the attorney's fee award, we remand for such evaluation. *See Fleming*, 898 F.2d at 563-64. On remand, the district court should consider the amount of attorney's fees already awarded in Phase I in determining a reasonable amount for Phase II, though the Phase I award should not be adjusted except as aforementioned. We emphasize that any disproportionality that may be present in this case does not mean that the amount of attorney's fees awarded for Phase II was an abuse of discretion, but only that the district court should consider such proportionality factors in exercising its discretion in fashioning a reasonable attorney's fee.

d) James's other objections.

James raises a number of less significant objections to the district court's fee order, such as that Jacob, Burns's time entries are vague or that Jacob, Burns billed too much time working on the appeal in light of the firm's experience. These issues are left to the sound discretion of the trial court and,

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[6] Where a statute provides for certain enhancements (or reductions) to damages, as 29 U.S.C. § 1132(g) (2) does, the district court should apply these adjustments to the damages claimed and the damages recovered in deciding whether to reduce attorney's fees because of disproportionality.

unlike in the case of substantial settlement offers or disproportionality, the district court need not demonstrate in a fee order that it has considered each individual objection. *See EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1288 (7th Cir. 1995). After a review of the record, we find that the district court acted within its discretion in rejecting James's claims on these issues.

As with Phase I, we have adjudicated all of the parties' objections to the Phase II fee award. The Phase II fee award may be adjusted downward after the district court considers James's settlement offer and the possible disproportionality of the award. In addition, if James prevails on Claim II, the district court must ensure that the Phase II award compensates Moriarty only for the time spent on Claim I. Any reason for changing the Phase II award besides these three is either forfeited or barred by the law of the case.

III. Conclusion

Because of judicial estoppel, the single employer doctrine must be used to determine whether James was a principal owner of the Home/WSL organization during the first half of 1987 for purposes of Claim II. The district court did not abuse its discretion in awarding the Phase I attorney's fees, and on remand the Phase I fees should be adjusted only if James prevails on Claim II. The fee order for Phase II does not establish that certain important factors, namely, a substantial settlement offer and the possible disproportionality of the attorney's fee award to both the damages claimed and the damages recovered, were considered, and we remand to the district court to consider James's contentions and Moriarty's replies on these issues in determining a reasonable Phase II attorney's fee. In addition, as with the Phase I award, the Phase II award must be adjusted if James prevails on Claim II. For the reasons stated herein, we Vacate the decision of the district court and Remand for further proceedings consistent with this opinion.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1849

THOMAS J. MORIARTY,

Plaintiff-Appellee,

v.

JAMES F. SVEC, individually, doing business as SVEC AND SONS FUNERAL HOME and doing business as WEST SUBURBAN LIVERY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96-C-7392—**George W. Lindberg**, *Judge*.

Argued September 25, 1998
Decided December 14, 1998

Before FLAUM, MANION, and EVANS, *Circuit Judges*.

FLAUM, *Circuit Judge*. Under the terms of a series of collective bargaining agreements ("CBAs") with Teamsters Local No. 727 ("Union"), James Svec, the owner and operator of the Svec & Son's Funeral Home ("Funeral Home") and the West Suburban Livery Service ("WSL"), promised to make contributions to multi-employer pension and welfare funds on behalf of his employees. However, James made no contributions on his own behalf, nor on behalf of WSL's employees, claiming that neither were covered by the CBAs. The Trustee of the pension and welfare funds sued

to compel payment and the district court granted its motion for summary judgment. James appealed that decision, and we now vacate and remand for further consideration.

Background

James Svec and his sister Sharon own the Funeral Home and WSL together.[1] Since the death of their father, Elmer Svec, James has operated both businesses as sole proprietorships. Until 1995, the Funeral Home belonged to the Funeral Directors Services Association ("FDSA"), an employer organization of approximately 250 licensed funeral businesses providing funeral, livery and funeral transportation services. The FDSA entered into a series of CBAs with the Union requiring each of its members to contribute to the Union's Pension Trust and Health & Welfare Fund ("Funds") on behalf of their employees in various work classifications.[2]

Elmer Svec died in June 1987. He had been the sole proprietor of the Funeral Home and a part owner of WSL with James for many years. At his death, Elmer's interest in both enterprises passed to his wife Anne. She later divided her interest in the businesses equally between James and Sharon. On February 16, 1988, Anne disclaimed all her rights, title, and interest in the real estate connected with the Funeral Home, and on April 15, 1993 James and Sharon signed documents indicating the receipt of their shares in the businesses. The legal consequences of Anne's disclaimer and the documents signed by James and Sharon are disputed by the parties.

During the period the Funeral Home belonged to the FDSA, Elmer, and later James, never made contributions

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[1] Although originally named as a defendant, the Trustee has since voluntarily dismissed Sharon Svec.

[2] The Funeral Home withdrew its membership in the FDSA in 1995, and the parties agree that for the purposes of this case, all liability pursuant to the CBAs ceased at that time.

to the Funds for work performed by James himself, nor did they contribute on behalf of any WSL employees. In 1997, the Trustee of the Funds, Thomas Moriarty, sued under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1997), and Sections 502(a)(3) and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(3) and 1145 (1997), to collect unpaid contributions on behalf of James and the WSL employees.

In the district court, James argued that he had been the "principal owner" of the Funeral Home since his father's death in 1987 and was therefore not an "employee" as defined by the CBAs. He thus claimed not to owe any contributions on his own behalf since 1987. James also argued that when the Funeral Home changed hands Illinois' common law of successor liability cut off any obligation to pay the contributions that his father failed to make. Finally, James maintained that WSL, which had never been a member of the FDSA, was not bound by the CBAs and, therefore, he owed nothing to the Funds on behalf of its employees. The Trustee responded that even if the CBAs excluded "principal owners," James did not become one until 1993, on the day he signed documents acknowledging receipt of his shares in the business. James therefore owed contributions for himself from 1987 to 1993. The Trustee also argued that under ERISA, federal successor liability preempts state law and makes James liable for the contributions his father had failed to pay. Finally, because the Funeral Home and the WSL are in practice a "single employer", the latter is subject to the CBAs to the same extent as the former, so James owed contributions to the Funds on behalf of all WSL employees.

The court agreed with these arguments and found for the Trustee. In addition to granting its motion for summary judgment requiring the payment of back contributions, the court also awarded the Trustee's attorney's fees and costs.

Ten days before the court issued its summary judgment order, the National Labor Relations Board ("NLRB" or "Board") decided a dispute between WSL and the Union. *James Svec and Sharon Svec d/b/a West Suburban Livery and Auto Livery Chauffeurs, Embalmers, Funeral Directors, et al., I.B.T. Local 727, AFL-CIO, NLRB* Case No. 13-RM-1657 (Feb. 9, 1998) (unpublished Decision and Order). The issue before the Board was whether the Union represented WSL's employees for collective bargaining purposes. While it found that the Funeral Home and WSL constituted a "single employer", the Board concluded that the Union did not represent WSL's employees.

Although James failed to inform the court of the Board's proceedings or decision, he filed a motion to re-consider after the summary judgment order claiming the NLRB's decision stripped the court of jurisdiction to declare WSL bound by the CBAs. The court rejected James's motion, explaining that he had waived this argument by not presenting it prior to summary judgment.

On appeal, James raises three objections to the district court's order. First, he argues that the court's approach to successor liability is impermissible in light of the Supreme Court's recent decision in *Atherton v. FDIC*, 519 S.Ct. 213 (1997) because it amounts to the creation of unnecessary federal common law. Next, the court erred in holding as a matter of law that the term "employee" in the CBAs unambiguously described James at all relevant times, rendering him liable for contributions on his own behalf. Third, once the NLRB rendered its decision, the court should not have decided whether WSL was a party to the CBAs. Because the Board held that WSL's employees were not represented by the Union, they could not be bound by the

CBAs and the court had no jurisdiction to hold otherwise.[3] While we agree with the findings of the district court regarding successor liability and liability for WSL employees, because the question of James's liability for contributions on his own behalf was not fully addressed below, we remand for reconsideration.

ANALYSIS

Successor Liability

James argued in the district court that, according to Illinois' common law of successor liability, he was not liable for any contributions his father Elmer failed to pay before his death on June 29, 1987. If state law applied, James would be correct. Consistent with its interest in facilitating the market for productive assets, Illinois common law states that a successor entity does not assume the liability of its predecessor.[4] *Vernon v. Shuster*, 688 N.E.2d 1172, 1175 (Ill. 1997) (son's inheritance of father's sole proprietorship cuts off liability). Under Illinois law, because the original Funeral Home ended with the death of his father, James should not have to pay any contributions which accrued prior to that date.

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[3] James also objects to certain items included in the court's award of costs and attorney's fees. While we realize that this award may have to be adjusted on remand to reflect any additional proceedings, we see no error in any of the cost and fee calculations the court has already ordered.

[4] To prevent fraud or fundamental unfairness to creditors, Illinois's general rule against successor liability contains four exceptions: "(1) Where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligation." *Vernon*, 688 N.E.2d at 1175. No exception, however, is relevant here.

The district court did not dispute this interpretation of state law. Instead, it held that Illinois' successor liability rule had been pre-empted in this situation by federal common law. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac,* 920 F.2d 1323 (7th Cir. 1990). In *Artistic Furniture,* we stated that in order to further congressional objectives, successor entities can be liable for multi-employer pension contributions if (1) there is sufficient continuity between the two companies and (2) the successor company had notice of the predecessor's liability. *Id.* at 1329. Because the only change in the Funeral Home since Elmer's death was James's ownership, the district court easily found sufficient continuity between the two entities. The court also held as a matter of law that James had notice of the contribution liability prior to taking control. *See EEOC v. Vucitech,* 842 F.2d 936, 945 (7th Cir. 1988) ("[T]here is no question that the successor knows of any collective bargaining agreements that his predecessor has signed . . .").

On appeal James claims the district court's approach is impermissible in light of the Supreme Court's decision in *Atherton v. FDIC,* 117 S.Ct. 666 (1997). *Atherton* requires a showing of significant conflict between a specific federal interest and the use of state common law before a court can displace that common law with a federal rule. *Id.* at 673. The mere existence of federal regulation in an area does not necessarily create sufficient conflict. *Id.* at 670. According to James, no conflict exists here because the provision the Trustee is attempting to enforce, Section 515 of ERISA, is meant to supplement, not displace state common law: "[Section 515] only creates a federal ERISA obligation for employers who are obligated to make contributions even absent the statute—in other words, those who are obligated under state law." *Sullivan v. Cox,* 78 F.3d 322, 325 (7th Cir. 1996). Also, courts follow common law rules in other areas of Section 515, implying the absence of any significant conflict. *See Levit v. Ingersoll Rand Fin. Corp.,* 874 F.2d 1186, 1193-

94 (7th Cir. 1989) (applying state corporate veil-piercing law to determine Section 515 liability of corporate officers). Essentially, James maintains that *Artistic Furniture* amounts to the creation of impermissible common law and he asks us to overrule it. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").[5]

The Trustee responds that James has waived this argument by failing to raise it below.[6] *See Koffski v. Village of North Barrington*, 988 F.2d 41, 44 n.7 (7th Cir. 1993). This is incorrect for two reasons: First, James has properly preserved the argument by raising the common law successor liability issue. Unlike the cases cited by the Trustee, where parties attempted to raise new legal or factual arguments for the first time on appeal, James's current claim is contained in what he argued in district court. Implicit in the claim that state common law governed this case was that no federal rule conflicted. Second, and more fundamentally, an appellant can

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[5] At oral argument, James's counsel argued for the first time that our decision in *Artistic Furniture* also impermissibly preempts state probate law. According to James, because the Trustee in this case did not pursue his claim against Elmer Svec's estate in any probate proceeding yet was still able to collect the unpaid contributions, state probate law is being displaced by a federal rule. This argument is unavailing. First it is almost certainly waived: "The well-established rule in this Circuit is that a plaintiff waives the right to argue an issue on appeal if she fails to raise the issue before a lower court." *Robyns v. Reliance Standard Life Insurance*, 130 F.3d 1231, 1238 (7th Cir. 1997). Even if it were not waived, moreover, we question whether anything in *Artistic Furniture* displaces state probate law. The district court found James's Funeral Home to be the successor of the Funeral Home run by Elmer. The liability James faces does not spring from Elmer Svec's estate but from the court's finding that the Funeral Home continued to be responsible for past contributions. The disposition of Elmer's estate, and therefore Illinois probate law, is irrelevant.

[6] In the district court, James only argued that under the state common law rule of successor liability, he was not liable. He did not mention federal common law.

always challenge the legal theory upon which the district court relied in its decision. As we have previously explained, "[i]t is folly . . . to assert that an appeals court on review of a district court judgment cannot consider the merits of each and every theory the district judge relied upon in deciding the case." *United States v. City of Chicago*, 869 F.2d 1033, 1036 (7th Cir. 1989). The district court's decision relied on a theory of federal preemption in holding James liable. *See Moriarty v. Svec*, 994 F.Supp. 963, 968 (N.D. Ill. 1998). He is now free to argue on appeal that the court's theory was wrong.

However, James's argument on the merits is not convincing. We read nothing in *Atherton* as undermining *Artistic Furniture*. *Atherton* simply reminds federal courts that *Erie* is still the law and that we are not free to fashion federal rules around a statute without identifying a significant conflict created by the application of state common law. 117 S.Ct. at 670. In *Atherton*, the Court rejected the FDIC's attempt to apply a pre-*Erie* federal common law standard of care for officers of federally chartered banks. The Court found that applying state common law did not significantly conflict with the federal interest in uniformity. Nor did federal incorporation of the banks at issue or the FDIC's rule-making power create a conflict with the application of state law. *Id.* at 671-73.

Atherton does not preclude courts from applying appropriate federal rules in areas where Congress manifests a desire to avoid significant conflict. ERISA is one of those areas. The Supreme Court has recognized that Congress, in enacting ERISA, "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits)). This court has developed such federal

common law in the interpretation of ERISA plans. *See Mathews v. Sears Pension Plan,* 144 F.3d 461, 465 (7th Cir. 1998); *Santaella v. Metropolitan Life Ins. Co.,* 123 F.3d 456, 461 (7th Cir. 1997); *Swaback v. American Information Technologies Corp.,* 103 F.3d 535, 540 (7th Cir. 1996). Our decision in *Artistic Furniture* is consistent with this approach and with *Atherton.*

In *Artistic Furniture,* we identified a significant federal interest that was threatened by the common law rule of successor liability. 920 F.2d at 1328. As we stated in describing Section 515: "The federalization of multi-employer plan contribution obligations evinces a strong congressional desire to minimize contribution losses and the resulting burden such losses impose on other plan participants." *Id.* We emphasized that the state law of successor liability, which cuts off the obligation to pay a predecessor's promised contributions, significantly conflicts with this federal interest and justifies a departure:

> Absent the imposition of successor liability, the hardships that Congress sought to stave off in enacting [Section 515] may indeed result in cases where a predecessor employer is unable to fulfill its contribution obligations. As old collective bargaining agreements are renegotiated, and new ones are formulated, present and future employers will have to increase their plan contributions in order to cover shortfalls created by the financial collapse of delinquent employers. In the face of this possible consequence, we believe that the congressional policies animating [Section 515] support the imposition of successor liability for unpaid multi-employer pension fund contributions . . .

920 F.2d at 1329.

James reasons that because Section 515 is based on rights created by state law, and because this court has applied state law to other questions arising under Section 515, we must in

every circumstance apply state common law. This all-or-nothing approach is not supported by any case James cites. *See Sullivan*, 78 F.3d at 324-25; *Levit*, 874 F.2d at 1193. Indeed, these cases only stand for the proposition that, absent some conflict, courts should apply state common law to questions arising under Section 515. But a conflict is exactly what *Artistic Furniture* addresses.

Artistic Furniture remains this circuit's approach to federal rule-making under ERISA and nothing the Supreme Court has said undermines it. Thus federal instead of state successor law applies to this case. Because James does not challenge the district court's finding that both the continuity of ownership and notice requirements have been met, its decision should stand, and James should be liable for any contributions under the CBAs his father was obligated to pay.

Contributions on Behalf of James Svec

James next argues that he owes no contributions on his own behalf after the date he became the principal owner of the Funeral Home. Both parties seem to agree that contributions are not required for principal owners because they are excluded from their understanding of the term "employee" in the CBAs. Anne Svec, James's mother, renounced her interest in the business in 1988. This, James argues, made him the principal owner as of June 1987, the date of Elmer's death, according to Illinois's relation-back doctrine. *See In re Atchison*, 925 F.2d 209, 211 (7th Cir. 1991) (discussing Illinois's relation-back doctrine for disclaimed testamentary gifts); *Tompkins State Bank v. Niles*, 537 N.E.2d 274, 279 (Ill. 1989). According to James, the formalization of the agreement in 1993 was simply meant to clarify any uncertainty regarding his and Sharon's interest in the business. Thus he was the principal owner since his father's death and does not owe any contributions on his own behalf past 1987. The Trustee responds that Anne's 1988 disclaimer only covered the real property connected to the

Funeral Home and not her interest in the business itself. Also, the Funeral Home treated James as an employee in its tax returns and other paperwork between 1988 and 1993. Therefore James was not the principal owner until 1993, and he was obligated to contribute on his own behalf until that date. While James denies this interpretation, he argues that at the very least it raises an issue of material fact sufficient to survive summary judgment.

The district court avoided this dispute by holding that the CBAs are unambiguous and do not contain any principal owner exception. Therefore, it did not determine the exact date on which James became the principal owner. The court read the term "employee" in the CBAs as susceptible to only one reasonable interpretation, and because James worked for the Funeral Home at all relevant times, he was always an employee. That both parties agree no contributions are owed for principal owners is irrelevant if no such exclusion is evident on the face of any of the CBAs. Any exceptions, the court reasoned, amounts to an oral side agreement that is not enforceable if it conflicts with the unambiguous terms of the CBAs. *Central States v. Gerber Truck Service,* 870 F.2d 1148, 1149 (7th Cir. 1989) (en banc) (plan trustee entitled to enforce writing "without regard to understandings or defenses applicable to the original parties.") Because the court found the term "employee" unambiguously included James, he owed contributions on his own behalf for as long as he worked at the Funeral Home.

We review de novo the district court's interpretation of pension plan terms and will affirm the grant of summary judgment only if there is no genuine issue of material fact and the Trustee is entitled to judgement as a matter of law. *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 278 (7th Cir. 1994). As we have stated, "Summary judgment is particularly appropriate in cases involving interpretation of written contracts." *ICEBU v. Hyster-Yale Materials Handling, Inc.*,

83 F.3d 930, 932-33 (7th Cir. 1996) *citing Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). If the contract is susceptible to only one reasonable interpretation, it is unambiguous and the court should determine its meaning as a matter of law. *ICEBU*, 83 F.3d at 933. The ambiguity of otherwise clear terms can be established by extrinsic evidence if there is "contractual language on which to hang the label of ambiguous or some yawning void . . . that cries out for an implied term." *Bidlcak v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993). We must reverse and remand if we disagree with the lower court's finding that no ambiguity exists in a contract term and conclude that further proceedings are necessary to establish its meaning. *See Central States v. Kroger Co.*, 73 F.3d 727, 733 (7th Cir. 1996).

We begin with the statutory basis for the Trustee's claim. Section 515 of ERISA provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. In this case, contributions must be made in accordance with the terms of the CBAs. Section IV of each CBA requires that "each employer member shall contribute [to the Funds] . . . on account of each salaried employee covered by this agreement who is in the employ of such employer member . . . " The relevant CBAs define "employee" as "any member of the Union who is in the employ of an employer member who is serving as funeral director or embalmer trainee." The district court found that this definition unambiguously covered James because he was a Union member who did funeral directing for the Funeral Home. Because it found no ambiguity in the term

"employee", the district court declined to examine any extrinsic evidence of the parties' understanding of the term.

We respectfully decline to follow the district court's approach because we see ambiguity in the use of the term "employee" in the CBAs. First, we look to the understanding of the term in its ordinary and popular sense. *See Phillips v. Lincoln Nat'l Life Ins.* Co., 978 F.2d 302, 308 (7th Cir. 1992). We have previously noted that the ordinary defintion of the term "employee" is "one employed by another . . ." *ICEBU*, 83 F.3d at 933 *quoting* Webster's Third New International Dictionary 743 (1986). This understanding would seem to exclude those who work for themselves. Can a single person be both an employee and "another" at the same time? As James points out, the ordinary sense of the term implies at least two people—the employer and the employee.[7]

Under ERISA, a pension plan participant cannot be both an employer and an employee at the same time: "The majority of courts to address the issue . . . have concluded that such 'dual status' individuals are barred from participation." *Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 958 (lst Cir. 1989); *Peckham v. Board of Trustees*, 653 F.2d 424, 427 (10th Cir. 1981); *but see Dodd v. John Hancock Mutual Life Ins. Co.*, 688 F.Supp. 564, 571 (E. D. Cal. 1988) (contra); *see also Grantham v. Beatrice Co.*, 776 F.Supp. 391, 393 (N.D. Ill. 1991) (corporate directors are not "employees" under ERISA plan). Moreover, the regulations promulgated by the Secretary of Labor pursuant to ERISA

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[7] The district court did not attempt to draw any distinction between James individually and the Funeral Home as an entity. This was appropriate. The Trustee is seeking contributions from James Svec himself and because the Funeral Home is operated as a sole proprietorship, it is not clear that it has any independent legal significance in this case. *See Matter of Baker*, 114 F.3d 636, 639 (7th Cir. 1997) (noting that in sole proprietorship, person and business are identical, and the business is not entitled to special entity status of corporation).

exclude from the definition of employee any individual who wholly owns a trade or business, whether incorporated or unincorporated. *Giardono v. Jones*, 867 F.2d 409, 412 (7th Cir. 1989) (a sole proprietor cannot participate in an ERISA pension plan) (construing 29 C.F.R. § 2510.3-3(c)(1)); *Matter of Baker*, 114 F.3d 636, 639 (7th Cir. 1997) (same); *but see Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 449 (4th Cir. 1993) (holding that 29 C.F.R. § 2510.3-3 does not modify the statutory definition of employee for all purposes). These cases at least indicate that in other areas of ERISA, the term employee does not necessarily include those who work for themselves.

The definition used in the CBAs does not appear to change the general ERISA conception of employee. It only adds the requirement that a person for whom benefits are owed must belong to the union and perform funeral directing services for a member of the FDSA. This definition does not answer whether a self-employed person is employed "by another" or not. Both interpretations are reasonable in this context, so the term is necessarily ambiguous. We are therefore precluded from affirming the grant of summary judgment. *Kroger*, 73 F.3d at 733.

In the face of such ambiguity, a court should look at extrinsic evidence to determine what meaning the parties attached to the term. *See FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989). Although both parties seem to agree that principal owners are not included in their understanding of the term "employee", the district court felt compelled to disregard this evidence. The court relied on our decision in *Gerber* for the proposition that Section 515 of ERISA "prevents a court from giving force to oral understandings between the union and employer that contradict the writing." 870 F.2d at 1154. In *Gerber*, an employer and a union agreed that only a few of the employer's drivers would be covered by a collective bar-

gaining agreement requiring contributions to a pension fund which, on its face, covered all employees. There was no ambiguity in the terms of the agreement in *Gerber*, only a second oral agreement which limited coverage to the detriment of the pension plan. *Id.*[8] In the present case, there is nothing inconsistent about the parties' understanding of the term "employee" in the CBAs and the term itself. As noted above, "employee" does not necessarily include the self-employed. Even the Trustee admits that principal owners are not employees; that is why it seeks contributions only through April 1993, the date upon which they claim James became a principal owner. Otherwise the Trustee may have had a fiduciary duty to seek contributions on behalf of James through 1995, the date the Funeral Home withdrew from the FDSA, ending its obligation to make any new contributions to the Funds. *See* 29 U.S.C. § 1104(a)(1)(A)(i). Therefore, unlike *Gerber*, this is not a case where the pension plan's expectations are being frustrated by secret side agreements negating previously negotiated CBAs. *See* 870 F.2d at 1155. The extrinsic evidence of the parties' understanding of the term "employee" is highly relevant, and in this case, the district court must consider it. That both parties agree on the term's interpretation does not automatically make that understanding an impermissible side deal.

Thus, because we do not consider the term "employee" to be unambiguous in this case, we must allow the district court to examine its meaning more fully. If the court finds that the term does not encompass principal owners, it must then

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[8] In *Gerber*, as in this case, because the pension plan was a "defined benefits" plan, it required the pension fund to pay a certain level of benefits regardless of the amount of contributions collected for employers. The fund is harmed whenever an employer is allowed to avoid payment, or to secure benefits for workers nearing retirement age while avoiding paying contributions on behalf of younger employees. 870 F.2d at 1155 n.3.

determine when, based on the parties' evidence, James became one.

Contributions for WSL Employees

The district court found that the Funeral Home and WSL were a single employer.[9] The single employer doctrine holds that when two entities are sufficiently integrated, they will be treated as a single entity for certain purposes. *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965). The district court examined the following criteria in deciding that WSL and the Funeral Home comprised a single integrated enterprise: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800, 802 n.3 (1976) (quoting 380 U.S. at 256). The district court found that the Funeral Home and WSL easily met this test and held that, as a single employer, the two businesses were both covered by the CBAs and each must make contributions to the Funds.[10] Thus, although WSL did not sign any CBA, but the Funeral Home had, James owed contributions on behalf of all WSL employees within the CBA's definition.

Just prior to the district court's award of summary judgment, the NLRB decided the same single employer issue in a

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[9] The Trustee also claimed that WSL was the alter ego of the Funeral Home and that it displayed an independent intent to be bound by the terms of the CBA. Because we agree with the district court that the single employer finding disposes of the question of liability for contributions on behalf of WSL's employees, we need not address the Trustee's other theories.

[10] Although James objects to the court's conclusion regarding coverage of the CBAs, he disputes neither the court's, nor the NLRB's, single employer finding.

dispute between WSL and the Union. The question before the NLRB was whether the Union represented WSL's drivers for collective bargaining purposes. When the Union demanded to bargain on behalf these drivers, WSL filed a petition with the Board claiming that the drivers were not and had never been represented by the Union. The Union claimed that WSL and the Funeral Home were a single employer and because they represented employees of the Funeral Home, they necessarily represented the drivers of WSL as well. NLRB Case No. 13-RM-1657 at 2 (Unpublished Decision and Order). Although the Board, like the district court, found that the Funeral Home and WSL were a single employer, it held that WSL's drivers were not part of the same bargaining unit as the Funeral Home and were therefore not represented by the Union. *Id.* at 5 ("[I]t does not necessarily follow from the single employer finding that the Union is the representative of [WSL's] drivers by virtue of its collective bargaining agreement with [the Funeral Home].").

James reads the Board's decision to mean that because the employees of WSL are not in the bargaining unit represented by the Union, they are not covered by the CBAs negotiated by the Union. Therefore, James argues, he owes no contributions to the Funds on behalf of any current or former WSL employees.

The NLRB proceedings were apparently unknown to the district court until after it had granted summary judgment. When James moved to reconsider in light of the Board's decision, the court denied the motion, explaining in its order that such a motion may not be used to argue matters which could have been heard during the pendency of the summary judgment proceeding. *Caisse Nationale De Credit Agricole v. CBI Industires, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). According to the court, because James knew about the Board's deliberation prior to the final judgment he could not now use it as the basis for

reconsideration. *Id.* (only new evidence or "manifest errors of law" by the court justify reconsideration).

James now claims that the district court lacked subject matter jurisdiction to decide whether WSL employees were entitled to contributions under the CBAs. Arguing that is a representational issue, within the exclusive province of the NLRB (*see United Ass'n of Journeymen & Apprentices, Local 342 v. Valley Eng'rs* 975 F.2d 611, 613 (9th Cir. 1992)), James claims that the district court had no power to decide who was covered by the CBA, and should instead have deferred to the Board's bargaining unit decision. *See South Prairie Construction Co.*, 425 U.S. at 803-06. This jurisdictional argument, James insists, can be raised at any time. *Gorden v. Kreul*, 77 F.3d 152, 156 (7th Cir. 1996). Alternatively, he maintains that the NLRB's determination meant that WSL could not, as a matter of law, be subject to the CBAs and therefore the court's decision amounted to "a manifest error of law." 90 F.3d at 1270.

James's primary argument is jurisdictional. He claims that single employer status alone can make a non-signatory entity liable under a collective bargaining agreement only after there has been a separate finding that both entities form a single bargaining unit. *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 144 (3rd Cir. 1994) ("When two entities are found to be a single employer, one entity's collective bargaining agreement covers the other entity as well, provided that the two entities' employees constitute a single appropriate bargaining unit."). Not only is the bargaining unit determination necessary, argues James, it is also within the NLRB's exclusive jurisdiction. *See South Prairie*, 425 U.S. at 804 (holding that federal court should not have made bargaining unit decision in multi-employer case); *Brotherhood of Teamsters, Local 70 v. California Consolidators, Inc.*, 693 F.2d 81, 83 (9th Cir. 1982) (only NLRB can make bargaining unit determination); *but see Carpenters Local Union No. 1846 v. Pratt-*

Farnworth, Inc., 690 F.2d 489, 518 (5th Cir. 1982) (federal court can make bargaining unit determination if collateral to ERISA claim). The court, James concludes, should therefore have deferred to the NLRB's determination that the Funeral Home and WSL are not a single bargaining unit.[11]

The policy underlying the bargaining unit determination is to protect employees' right to choose their own representation:

> It is clear that the primary motivation of the Board in making an independent unit determination in a single employer case is to protect the rights under section 7 of the NLRA, 29 U.S.C. § 157, of the employees of each of the subentities constituting the single employer to bargain collectively with representatives of their own choosing. Section 9(b) of the NLRA, 29 U.S.C. § 159(b), directs the Board to "decide in each case whether, in order to assure employees the fullest freedom in exercising rights guaranteed by (the NLRA), the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ."

Pratt-Farnworth, Inc., 690 F.2d at 507.

This rationale is applicable in single employer cases where a federal court must determine whether the entities at issue are represented by the same union or whether either is guilty

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[11] We note that the Board did not actually hold that the Funeral Home and WSL are not an appropriate bargaining unit. On the contrary, the Board refused to certify anything less than a unit which included both entities' employees. It only held that WSL had not been, nor is it currently, part of the unit represented by the Union at the Funeral Home. *NLRB* Case No. 13-RM-1657 (Unpublished Decision and Order). Thus even if the NLRB were required to make a determination of the appropriate bargaining unit in this case, it could be argued that it already has—in the Trustee's favor.

of unfair labor practices against the other. *See Kansas City Southern Transport Co. v. Teamsters Local* 41, 126 F.3d 1059 (8th Cir. 1997); *Lihli Fashions Corp. v. N.L.R.B.*, 80 F.3d 743 (2nd Cir. 1996); *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1995); *Valley Eng'rs*, 975 F.2d 611 (9th Cir. 1992); *Stardyne, Inc.*, 41 F.3d 141 (3rd Cir. 1994); *Brotherhood of Teamsters, Local 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982); *Pratt-Farmworth, Inc.*, 690 F.2d 489 (5th Cir. 1982).

However, we cannot accept James's jurisdictional argument because nothing in the present case implicates representation or unfair labor practices. The only question here is whether the terms of the CBAs entered into by the Funeral Home apply to employees of WSL. Our Section 515 case law clearly establishes that we need not decide representational issues to impose liability for contributions to a multi-employer plan. *See Gerber*, 870 F.2d at 1153. In fact this court recently rejected James's reasoning in a case involving the same multi-employer pension fund. *Moriarty v. Larry Lewis Funeral Directors*, 150 F.3d 773 (7th Cir. 1998). In *Lewis*, Larry and Gina Lewis ran a small funeral home which belonged to the FDSA. Under the terms of their CBA they made contributions to the Funds on their own behalf. The business failed and the Lewises went to work for a funeral home owned by Larry's sister. They continued to contribute to the Funds for themselves, but not for any other employee of the funeral home. Larry eventually became the owner of his sister's funeral home and the Trustee sued claiming that contributions were owed on behalf of all its employees. The district court dismissed the complaint, in part because it felt liability depended on a bargaining unit determination which only the NLRB had jurisdiction to undertake. *Id.* at 775. This court disagreed and, as to the NLRB jurisdiction issue, stated:

> [W]e don't perceive its relevance to a suit under the collection provision of ERISA, 29 U.S.C. § 1132(e)(1). No employee wants to change bargaining representatives

> (or decertify a union); no one contends that an unfair labor practice has been committed; the NLRB therefore has no role to play. The Funds' claims are based on contracts rather than principles of labor law. Sometimes it is hard to tell whether a particular firm is a party to the contract; that is the problem this case poses, and it may be resolved without regard to the NLRB's principles of unit determination.

Id. at 776.

The present case involved a similar question of contract interpretation for the district court, and did not touch on any area of NLRB expertise. The court had to decide whether WSL employees were covered by the terms of the CBAs. The CBAs required contributions on behalf of all employees of employer members who performed livery services.[12] Once the court found that WSL and the Funeral Home were a single employer, and that WSL employees performed livery services, it could impose liability "in accordance with the terms and conditions of [the] . . . agreement." 29 U.S.C. § 1145. The CBAs do not define coverage based on any collective bargaining unit and no such requirement need be inferred. *See Central States v. Joe McClelland,* 23 F.3d 1256, 1258 (7th Cir. 1994). Therefore, as in *Lewis,* because the bargaining unit is not relevant to liability, the court did not need to address that issue. 150 F.3d at 776.

Because no NLRB issue is present here, the district court's decision concerning WSL liability was well within its

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[12] Article I of the CBAs covering livery drivers states that "[t]he agreement applies only to Employees who are auto livery chauffeurs." Article V requires each employer member to contribute to Funds on behalf of "each Employee covered by this Agreement who is in the employ of such Employer member . . . " Finally, Article XIII defines "Employee" as "[a]ny member of the Union who is in the employ of an Employer member who is an auto livery chauffeur."

jurisdiction. 29 U.S.C. § 1132(a)(3);[13] 29 U.S.C. § 1132 (e)(1); [14] *Martin v. Garman Construction*, 945 F.2d 1000, 1003-04 (7th Cir. 1991) (holding that an ERISA claim brought for collection of contributions was in the exclusive jurisdiction of the federal court despite a prior NLRB decision).

James's claim on the merits is no more convincing. He argues that because the Union was not the bargaining agent of WSL employees, it could not collectively bargain on their behalf, and consequently, the CBAs are invalid with respect to WSL. Our Section 515 case law, however, forecloses this argument. *Kroger*, 73 F.3d at 731 (["Under Section 515], a pension fund's reliance upon the terms of the CBA may not be thwarted . . . by defenses that may defeat enforcement of the CBA between the employer and the union . . ."). James's attack on the validity of the CBA does not affect his obligation to pay: "If the employer simply points to a defect in its formation—such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact

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[13] "(a) Persons empowered to bring a civil action—

A civil action may be brought— . . .

. . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-chapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . ."

[14] "(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

under labor law—it must still keep its promise to the pension fund." *Gerber*, 870 F.2d at 1153. By the terms of the CBAs, an employer promises to make contributions for all its employees. Because James is the employer of all WSL's drivers under a single employer theory he must contribute on their behalf regardless of his objections to the validity of the CBAs themselves. *Id.* (". . . nothing in ERISA makes the obligation to contribute depend on the existence of a valid collective bargaining agreement . . .").

Because neither of James's objections to the district court's decision regarding the WSL employees warrants a different conclusion, we see no reason to upset it on remand.

Conclusion

While we agree with the district court's holdings regarding successor liability and contributions on behalf of WSL employees, we have come to a different conclusion regarding contributions on behalf of James himself. Because we do not consider James to be unambiguosly included in the CBAs' definition of "employee," we must allow the district court to re-examine the meaning of the term taking the parties' extrinsic evidence into account. We therefore VACATE the district court's summary judgment and REMAND for further proceedings consistent with this opinion.

MANION, *Circuit Judge*, concurring. I concur with the result and most of the court's analysis. I write separately to focus on a few aspects of successor liability.

In addressing the successor liability issue, the defendant chose to argue that *Atherton v. FDIC*, 117 S.Ct. 666 (1997), had overruled *sub silentio* our prior decision in *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323 (7th Cir. 1990). The court's opinion correctly concludes that this argument fails. And because the defendant waived arguing that *Artistic Furniture* does not apply in the first

place, I agree that the defendant loses on this issue. But I emphasize that the defendant's waiver here does not resolve the question whether the rule of *Artistic Furniture* would apply to these facts.

Svec & Sons Funeral Home and West Suburban Livery are not legal entities. They are simply assumed names. Prior to Elmer Svec's death, Svec & Sons was the assumed name under which Elmer conducted business as a "sole proprietorship." And that term is merely a short hand formula for describing someone who, perhaps with property he owns individually, does business as an individual, and not through a corporation or a partnership. The "sole proprietorship" label simply means Elmer owned the business individually. *Vernon v. Schuster*, 688 N.E.2d 1172, 1176-77 (Ill. 1997) ("It is well settled that a sole proprietorship has no legal identity separate from that of the individual who owns it."). The name of the sole pro-prietorship is merely another name for "Elmer's." *See Main Street Development v. DeMicco*, 618 N.E.2d 442, 444 (Ill. App. 1993) ("The designation d/b/a or doing business as [ ] generally indicates a sole proprietorship or some other situation where the named person owns or transacts business under an assumed name."); *Vernon*, 688 N.E.2d at 1177 (referring to d/b/a as "pseudonym" of the individual who uses it). Prior to Elmer Svec's death in 1987, "Svec & Sons" was an alias for Elmer Svec, an individual, and "West Suburban Livery" was an alias for co-owners James and Elmer, who were apparently acting as a common law partnership, although the record is unclear on this point. At his death, Elmer's property passed to his estate. The estate's property, thus, included Elmer's half interest in the partnership with James and all of the property Elmer owned and used in the business known as "Svec & Sons" (presumably including goodwill). Because the record regarding the probating of Elmer's estate is unclear, we have remanded for further proceedings regarding that issue. But we know that at some point Elmer's property passed in equal

shares to his children, James and Sharon. Thus, it appears at this point that "Svec & Sons" is an alias for a partnership between James and Sharon and "West Suburban Livery" is an alias for a second partnership between them. (Sharon's absence from this suit should be irrelevant because generally partners are jointly liable for the debts and obligations of the partnership; thus, James represents her interest here. *See Cook v. Department of Revenue*, 666 N.E.2d 893, 896 (Ill. App. 1996) (interpreting Illinois' Uniform Partnership Act).)

This brings us to the important distinction between the assets of a deceased in an estate and the assets of a corporation. If James and Sharon's two partnerships are successively liable for the contractual obligations of Elmer individually and of Elmer and James' partnership, they are so liable because the obligations passed with Elmer's property through probate and into James' and Sharon's possession. The facts here are significantly different than those encountered in *Artistic Furniture*, where one corporation had purchased all the assets of another corporation. *See* 920 F.2d at 1325. Both parties assume without discussion that if *Artistic Furniture* is still valid law— which it is—that its rule for corporate successor liability applies here. Because the parties have waived any other argument, we need not decide whether this assumption is valid, but I write separately to point out that this assumption is far from clear.

As stated in *Artistic Furniture*, the general common-law rule is that a corporation which purchases the assets of another corporation is not liable for the other corporation's obligations, but the general rule has four exceptions. 920 F.2d at 1325. We adopted a somewhat broader rule for corporate successor liability in ERISA cases because we had to balance the interest of effectuating the federal policy with the common-law interest in "the fluid transfer of corporate assets." 920 F.2d at 1326. We are not dealing with corporate assets here, so that common-law interest is not present.

Neither party addressed the competing interests of individuals, estates, partnerships, corporations, and the state. Certainly at a minimum Illinois has an interest in the speedy and final resolution of estates. Moreover, the rule of *Artistic Furniture* was tailored for a fact setting involving a corporation's purchase of another's assets; thus, some of that analysis would not apply here. For example, the rule of corporate successor liability is premised on the assumption that the purchaser could negotiate the acquisition price based on the potential liability. 920 F.2d at 1327. Obviously that reasoning has no application in an estate transfer, where the heirs took possession of the property by inheritance. The possibility of taking on the obligations of the deceased may determine whether the heir agrees to take property or refuses it, as Anne Svec did here. We should not presume as a matter of law that an heir knows of the obligations of the deceased under the CBA (as we do in the corporate purchase of assets setting), although under the facts here James must have known of Elmer's obligations.

The court does not decide today whether the appropriate rule for successor liability under these facts is an application of state probate law, some federal common-law rule based on probate law, or some other rule. At oral argument, counsel for the plaintiff suggested that the answer to this issue is simple: ERISA preempts state probate law because ERISA preempts everything. That is an inadequate answer. First, this is an exaggeration; ERISA does not displace all other law. Second, even if ERISA did preempt some conflicting state probate law, it would still have to be decided what the appropriate rule under ERISA was. These issues will be resolved when the litigants properly raise and argue them.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

MORIARTY

VS

SVEC

11/24/1999
JUDGE GEORGE LINDBERG

Judgment is entered in favor of the plaintiff Thomas J. Moriarty and against defendant James F. Svec, individually and doing business as Svec & Sons Funeral Home and West Suburban Livery in the amount of $177,267.92. Enter judgment order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Docketed Nov. 26 1999]

No. 96 C 7392
JUDGE GEORGE LINDBERG

THOMAS J. MORIARTY, Trustee on behalf of the Trustees of the Local Union No. 727, I.B.T. Pension Trust, and the Trustees of the Teamsters Local Union No. 727 Health and Welfare Trust,

Plaintiff,

v.

JAMES F. SVEC, individually and d/b/a Svec & Sons Funeral Home and James F. Svec, individually and d/b/a West Suburban Livery,

Defendant.

JUDGMENT ORDER

Judgment is ordered to be entered in favor of plaintiff Thomas J. Moriarty and against defendant James F. Svec, individually and doing business as Svec & Sons Funeral Home and West Suburban Livery in the amount of $177,267.92. The judgment amount is comprised of the following damages:

A. Svec & Sons Funeral Home's delinquent Health & Welfare contributions for the period January 1987 through June 1987: $1,351.00;

B. Svec & Sons Funeral Home's delinquent Pension contributions for the period January 1987 through June 1987: $1,038.00;

C. West Suburban Livery's delinquent Health & Welfare contributions for the period October 1, 1993 through December 31, 1995: $11,444.00;

D. West Suburban Livery's delinquent Pension contributions for the period October 1, 1993 through December 31, 1995: $6,358.50;

E. Interest through September 1999 on the delinquent contributions at the rate set forth in the Fund's trust agreements: $15,386.53;

F. Twenty percent liquidated damages on the delinquent contributions: $4,038.30;

G. Attorney's fees: $126,511.32;

H. Audit fees: $6,688.27;

I. Costs: $4,452.00

ENTERED:

/s/ George W. Lindberg
George W. Lindberg
United States District Court

DATED: Nov. 18, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY

v.

JAMES F. SVEC

11/15/1999
JUDGE GEORGE LINDBERG

Plaintiff's motion for entry of final judgment and clarification of attorneys' fee ruling is granted in part and denied in part. Attorneys' fees for the period August 1995 through February 1998 shall be $66,511.32. In all other respects, the court's previous orders regarding attorneys' fees stand as entered. Plaintiff shall submit a new judgment order reflecting the court's ruling on or before November 23, 1999.

ORDER

The court will base the amount of fees for August 1995 through February 1998 on a total amount originally awarded of $120,928.48, and so will increase the amount of fees awarded for that period from $66,000.00 to $66,511.32.

The award of $66,000.00 in fees for the period of February 1998 to the present includes every time that would be recoverable in an award of attorneys' fees. This should be apparent to plaintiff from the order regarding those fees. If an item is not recoverable as a cost in a category other than attorneys' fees, it is a part of the attorneys' fees award. Therefore, any compensation for computer assisted legal research or paralegal fees is included in the amount for attorneys' fees. What are not included in the amount for attorneys' fees are cost recoverable pursuant to 28 USC § 1920.

/s/ George W. Lindberg

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY

v.

JAMES F. SVEC

10/29/1999
JUDGE GEORGE LINDBERG

Defendant's motion to reduce the amount of fees awarded to plaintiff [122] is granted. The attorneys' fees previously awarded to plaintiff are reduced to $66,000.00.

ORDER

Defendant has moved to reduce attorneys' fees this court previously awarded to plaintiff. In addition, plaintiff has petitioned for, and defendant has opposed, additional attorneys' fees in connection with this action. Finally, defendant has moved for leave to file a sur-reply on the matter of plaintiff's petition for additional fees. This order concerns only defendant's motion to reduce attorneys' fees previously awarded to plaintiff.

As to the fees previously awarded, the court agrees with defendant that the Seventh Circuit's opinion contemplates that this court may wish to revisit the question of the appropriateness of the amount of attorneys' fees awarded for the period between August 14, 1995, and February 24, 1998, in light of proceedings in this case subsequent to that award. See *Moriarty v. Svec*, 164 F3d 323, n3 (7th Cir 1998). The court is also of the opinion that the amount of fees previously awarded should be reduced, especially in light of the considerably lessened degree of success plaintiff ultimately had with respect to the claims it made in the course of this litigation. Per defendant's suggestion, of the $120,000.00 in fees originally awarded, one-half (which shall be taken as attributable to the Funeral Home part of this action) shall be reduced by 90 per cent (to reflect the extremely limited success of plaintiff with respect to that claim).

Therefore, defendant's motion to reduce fees previously awarded is being granted and those fees are being reduced to $66,000.00

/s/ George W. Lindberg

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY

v.

JAMES F. SVEC

10/29/1999
JUDGE GEORGE LINDBERG

Defendant's motion for leave to file a sur-reply on the matter of plaintiff's petition for additional fees is granted. Plaintiff's motion for award of attorneys' fees is granted in part and denied in part. Plaintiff is awarded $60,000.00 in attorneys' fees for the period since February 24, 1998.

ORDER

Defendant has moved to reduce attorneys' fees this court previously awarded to plaintiff. In addition, plaintiff has petitioned for, and defendant has opposed, additional attorneys' fees in connection with this action. Finally, defendant has moved for leave to file a sur-reply on the matter of plaintiff's petition for additional fees. This order rules on plaintiff's motion for additional fees and defendant's motion for leave to file a sur-reply. Defendant's motion to reduce attorneys' fees this court previously awarded to plaintiff is the subject of a separate order.

The question raised by plaintiff's current petition for fees, defendant's objection thereto, plaintiff's reply, and now defendant's sur-reply, is what amount of additional attorneys' fees to award plaintiff for the period since February 24, 1998. With respect to that question, the court concludes: (1) The evidence provided shows the market rate for attorneys prosecuting ERISA collection actions is the $165.00 per hour plaintiff's attorneys charged, see *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company*, 76 F3d 114, 117 (7th Cir 1996) ("[T]he court should make an award representing the cost the victorious litigant would have incurred to buy legal services in the market, no matter how the litigant actually acquired those services."). Neither plaintiff nor its attorneys are entitled to recover at a rate greater than the market rate for the particular legal service in question. (2) Plaintiff did not waive attorneys fees on appeal, and the case cited by defendant is not to the contrary, see *Ligouritis v. Whyte*, 951 F2d 818, 822 (7th Cir 1992). (3) Plaintiff is not entitled to recover for the time it spent litigating over the question of when defendant James F. Svec became the funeral home's owner, as that concerns claims on which defendant rather than plaintiff prevailed. (4) Plaintiffs attorneys' hours will ot be reduced based on a comparison of the hours the y expended with the hours defendant's attorneys expended on this case.

In light of the foregoing observations, and the very limited degree of success plaintiff had in this action, the court believes that $60,000.00 represents a reasonable amount of attorneys' fees for services provided to plaintiff since February 24, 1998.

/s/ George W. Lindberg

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY

v.

JAMES F. SVEC

9/20/1999
JUDGE GEORGE LINDBERG

Enter revised memorandum and order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7392
JUDGE GEORGE W. LINDBERG

THOMAS J. MORIARTY,

Plaintiff,

v.

JAMES F. SVEC,

Defendant.

REVISED MEMORANDUM AND ORDER

Plaintiff Thomas J. Moriarty, as trustee of the Local Union No. 727, International Brotherhood of Teamsters Pension Trust ("Pension Fund") and Teamsters Local Union No. 727 Health and Welfare Trust ("Health and Welfare Fund")(collectively "the Funds"), brought this action against defendant James F. Svec to enforce payment of delinquent contributions allegedly due pursuant to a collective bargaining agreement between the Funeral Directors Services Association of Greater Chicago (FDSA) and the Auto Livery Chauffeurs, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers and Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers and Wash Rack Attendants Union, Local No. 727, International Brotherhood Teamsters ("the Union"). Defendant is the owner of Svec & Sons Funeral Home ("the Funeral Home") which was a member of the FDSA during the relevant time period. The parties have filed cross-motions for

summary judgment pursuant to Fed. R. Civ. P. 56(c) on the issue of the Funeral Home's liability to the Funds for contributions for work performed by defendant at the Funeral Home between January 1, 1987 and June 29, 1987. Defendants have also moved for summary judgment as to the time period June 29, 1987 to April 15, 1993 and April 15, 1993 to September 30, 1995. Plaintiff also filed a motion to strike certain statements in defendant's motion for summary judgment. For the reasons set out below, the motion to strike is denied, plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied as to the time period January 1, 1987 to June 29, 1987. Defendants' motion is granted for the time period June 30, 1987 to September 30, 1995.

Elmer Svec owned the Funeral Home in its entirety from about November 1978 until his death on June 29, 1987. His son, defendant James Svec, inherited 50% of the Funeral Home upon Elmer's death. In January 1987, Elmer and James Svec each owned a 50% interest in West Suburban Livery (WSL), a funeral livery and limousine service. The Funeral Home was a member of FDSA from at least 1979 to December 1995 and was bound by collective bargaining agreements into which the FDSA entered during that time. James Svec was a member of the Union from at least 1979 to December 1995. The relevant collective bargaining agreements and amendments provide that each employer member of the FDSA is obligated to contribute certain set amounts to the Funds for work performed by their employees. Funeral directors, embalmers and funeral director and embalmer trainees are covered by this collective bargaining agreement. It has been the practice of the trustees in audits since 1993 to exclude from the definition of "employee" workers with at least a 10% interest in the business for which the work is performed. James Svec has worked full-time as a funeral director at the Funeral Home since 1978 including the period between January and June 1987. Since plaintiff

concedes that contributions are not owed on behalf of primary owners and, that between June 29, 1987 through September 30, 1995, James Svec was a primary owner, defendants' motion for summary judgment as to its obligation to make contributions on James Svec's behalf from June 29, 1987 through September 30, 1995 is granted.

This action was originally brought before this court to enforce payment of delinquent contributions allegedly due to the Funds for the work James Svec performed as an employee at the Funeral Home from January 1, 1987 through September 30, 1995, and for the work of other employees at WSL. This court held that the term "employee" was not ambiguous as it appeared in the collective bargaining agreements and there was no need to look to extrinsic evidence to determine its meaning. *Moriarty v. Svec*, 994 F. Supp. 963, 966 (N.D. Ill. 1998). Additionally, this court held that the Funeral Home and WSL are considered a "single employer" for jurisdictional purposes under the collective bargaining agreements. *Id.* at 970. Under this theory, WSL is held to the agreement signed by the Funeral Home due to the extent of interrelation of operations, common management, centralized control of labor relations and common ownership. *Id.* at 969. Thus, this court granted summary judgment for plaintiff holding that defendant was liable for contributions for himself and WSL employees. *Id.* at 970.

On appeal, the Seventh Circuit vacated and remanded holding that the term "employee" as used in the collective bargaining agreement was ambiguous and that extrinsic evidence such as the parties' understanding of the term should have been considered. *Moriarty v. Svec*, 164 F.3d 323, 330 (7th Cir. 1998). The court held that if the term as used in the collective bargaining agreement does not include principal owners then this court must determine when defendant became a principal owner. *Id.* at 332. The court also found defendant liable for the contributions for WSL. *Id.*

at 335. On remand, the parties have filed the previously mentioned cross motions for summary judgment currently pending in this court.

Plaintiff has moved to strike statements made in defendant's motion for summary judgment. The statements are not supported by specific citations to the record in the 12(M) statement. In deciding a motion for summary judgment, the court will only consider as facts statements of fact supported by specific references to affidavits, parts of the record and other supporting materials. U.S. Dist. Ct., N.D. Ill. G.R. 12. There is no need to strike the statements as they will not be considered for purposes of summary judgment insofar as they are not included in the 12(M) or 12(N) statements and are not properly supported by references to the evidentiary materials submitted. Plaintiffs motion to strike is denied.

Summary judgment is appropriate when there is "no genuine issue as to any material fact," and "the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The parties agree that, in practice, the trustees of the Funds exclude from the definition of "employee" workers with a significant interest in the company. During the six-month time period in question, James Svec worked at the Funeral Home as a funeral director, but had no direct ownership interest in the Funeral Home until his father's death at the end of June 1987. James contends that he was a principal owner during the time period in question because he was a fifty percent owner of WSL. In earlier proceedings, WSL and the Funeral Home were found to be a single employer for purposes of collective bargaining. *Moriarty v. Svec*, 994 F. Supp. 963, 970 (1998). As a result of this finding, WSL was held liable for contributions for employees of WSL even though WSL did not sign the collective bargaining agreement. Defendant argues that because the two businesses are considered a single employer for the purposes

of the collective bargaining agreement, he is exempt from contributing for himself as a principal owner of WSL.

Defendant cites no cases, and the court is aware of none, where the single employer doctrine has been used for such a purpose. The doctrine is typically used, as it was in this case, to bind purportedly independent companies to collective bargaining agreements. *Radio and Television Broad. Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965). The National Labor Relations Board ("NLRB") asserts jurisdiction over companies in order to remedy unfair labor practices and conduct representation elections. N.L.R.B. Twenty-first Ann. Rep. 7 (1956). The purpose of the single employer doctrine is to determine the proper jurisdiction of the NLRB so that it may achieve these goals. N.L.R.B. Twenty-first Ann. Rep. 14-15 (1956). If two companies satisfy the criteria that the NLRB and the Supreme Court have laid out, they will be considered a single employer and each will be liable for the other's labor decisions. *N.L.R.B. v. International Measurement and Control Co.*, 978 F. 2d 334, 339 (7th Cir. 1992); *Iowa Express Distrib., Inc. v. N.L.R.B.*, 739 F.2d 1305, 1310 (8th Cir. 1984). The doctrine is used to extend liability to companies that are nominally independent, but whose interrelation with another company renders them liable under that company's collective bargaining agreements. The NLRB wields this doctrine as a sword to promote just labor relations. Allowing the defendant to use the single employer doctrine to shield himself from liability goes against this purpose.

Defendant also argues that he is not liable for contributions for himself because, during the time period in question, he was the son of the owner of the Funeral Home. Defendant relies on the definition provided by the Labor Management Relations Act ("LMRA") which states that "[t]he term "employee" . . . shall not include . . . any individual employed by his parent or spouse." 29 U.S.C. § 152(3). Plaintiff

argues that the LMRA does not apply in this situation. Instead, plaintiff argues, the definitions of employee under the collective bargaining agreement and the Employee Retirement Income Security Act ("ERISA") control here. ERISA defines an employee as "any individual employed by an employer" with employer defined as "any person acting directly as an employer . . . in relation to an employee benefit plan." 29 U.S.C. § 1002(5), (6).

ERISA provides that parties agreeing to contribute to pension plans must do so to the extent promised, but not to an extent inconsistent with the law. 29 U.S.C. § 1145; *Central States, Southeast and Southwest Areas Pension Fund v. Hartlage Truck Serv. Inc.*, 991 F.2d 1357, 1360 (7th Cir. 1993). In order to determine the extent of James' liability, the court must look first to the collective bargaining agreement as the source of the original promise. *Illinois Conference of Teamsters and Employers Welfare Fund v. Mrowicki*, 44 F.3d 451, 458 (7th Cir. 1994). Article I of the collective bargaining agreement states that the agreement applies only to employees who do embalming, funeral directing or are trainee embalmers or funeral directors. Article IV of the collective bargaining agreement covers contributions to the Funds. Sections 1 and 2 of this Article provide that employers will contribute a certain sum for each employee. There is no exception listed anywhere in the agreement for workers who are the children of owners. Interestingly, there is an exception listed in Article IV, § 3 for the trainee embalmers and funeral directors in their first year of work. Thus, the parties explicitly stated in the agreement when they intended there to be an exception for fund contributions.

Defendant argues that the LMRA definition with its exception for children of owners is implicit in the collective bargaining agreement because it is the statutory background against which the agreement was made. Plaintiff maintains that it is the ERISA definition of employee that governs the

relevant collective bargaining agreement because ERISA is more closely related to the Funds than the LMRA is. The LMRA is a general act created to promote the flow of commerce and protect employers and employees in their relations. 29 U.S.C. § 141(b). ERISA is a more specific statute which governs the pension fund aspect of collective bargaining agreements. 29 U.S.C. § 1001. The ERISA definition of employee is the appropriate statutory background against which the pension fund aspect of the collective bargaining agreement was made. This is analogous to the principle of statutory construction that a specific statute will not be controlled or nullified by a more general one. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990).

In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), the Supreme Court held that the ERISA definition of employee is circular and explains nothing with reference to the distinction between an employee and an independent contractor. The court adopted a common law test based on traditional agency law principles for determining who qualifies as an employee. *Id.* The Court derived this test from *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989):

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of

the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

While this test is geared toward distinguishing an employee from an independent contractor, it informs any search for a general definition of employee under ERISA. There are no criteria in the test for determining whether a worker qualifies as an employee which make any reference to the absence or presence of a family relationship. It is irrelevant to the present case that James was the son of the principal owner of the Funeral Home. James is liable to the Funds for contributions for himself for work performed at the Funeral Home between January 1, 1987 and June 29, 1987.

ORDERED: Plaintiff Thomas J. Moriarty's motion to strike is denied and motion for summary judgment is granted. Defendant James F. Svec's motion for summary judgment is denied as to the time period January 1, 1987 to June 29, 1987 but defendants' motion for summary judgment is granted as to the time periods June 29, 1987 through September 30, 1995. Judgment in favor of plaintiff and against defendant will be entered. Plaintiff's counsel shall prepare a judgment order with current figures for amounts due the Funds, liquidated damages, interest, audit fees and attorneys' fees and costs by September 3, 1999. *See* Fed. R. Civ. P. 58.

ENTER:

/s/ George W. Lindberg
GEORGE W. LINDBERG
District Judge

DATED: Sep. 20, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Sent For Microfilming
Mar. 25, 1998

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96 C 7392

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

3/24/1998
JUDGE GEORGE LINDBERG

Judgment is entered in favor of the plaintiff in the amount of $233,315.62. ENTER MEMORANUDM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 7392
JUDGE GEORGE W. LINDBERG

THOMAS J. MORIARTY,

Plaintiff,

v.

JAMES F. SVEC,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff brought this action on behalf of the Trustees of Local Union No. 727, I.B.T. Pension Trust, and on behalf of the Trustees of Teamsters Local Union No. 727 Health and Welfare Trust in order to collect delinquent contributions to the respective trust funds on behalf of James F. Svec for work he performed at Svec & Sons Funeral Home and on behalf of the auto livery chauffeurs employed by West Suburban Livery. Plaintiff filed a motion for summary judgment which was granted. The court ordered plaintiff to submit a proposed judgment in chambers which states the amount of damages owed by defendant to plaintiff. Defendant filed a response which objected to certain portions of plaintiff's computation of damages, which the court will now discuss.

I. ATTORNEY'S FEES

Under the provisions of 29 U.S.C. § 1132(g)(2)(D), the court must award plaintiff his reasonable attorney's fees and

costs of the action, to be paid by defendant. Defendant objects to the hourly rate requested by plaintiff's attorney for work she performed in prosecuting this action. Defendant also objects to plaintiff's inclusion of the following items within its computation of attorney's fees: (1) work performed by Miriam Hernandez Rios for paralegal services which defendant claims are purely clerical in nature; (2) trial preparation after the parties' joint submission of the proposed final pre-trial order; (3) work performed with respect to Sharon Svec, a former co-defendant whom plaintiff voluntarily dismissed from this action; and (4) excessive time spent in attendance at court hearings. The court will discuss each of these objections in turn.

In determining the amount of attorney's fees which will be awarded to plaintiff, the court must determine whether plaintiff's computation of attorney's fees is reasonable. Ms. Hernandez states in her affidavit that due to its "dedication to the labor movement", her firm charges their labor union clients considerably less than the rate which could otherwise be procured by lawyers in the Chicago metropolitan area. In cases in which the court is unable to determine the attorney's true billing rate, the court may consider the rates charged by lawyers in the community who possess "reasonably comparable skill, experience, and reputation." *People Who Care v. Rockford Board of Education, School Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996) (quoting *Blum v. Stenson*, 465 U.S. 886, 892, 895 n.11 (1984)). Plaintiff presents the court with an affidavit of Charles B. Wolf, a Chicago attorney who has represented multi-employer pension funds in actions arising under the Employment Retirement Income Security Act of 1974 (ERISA). Mr. Wolf charges $260 an hour for work similar to that which was performed by plaintiff's attorneys in this case. He also states that his law firm charges $225 and $210 an hour for work performed by partners in his firm with less experience or by associates. The court finds that plaintiff's attorney, Marisel Hernandez, has established

her competence in the field of ERISA litigation sufficiently to warrant an attorney's fee for herself and her partner, Joseph M. Burns, of $225 an hour, their requested hourly rate. The court also finds that an attorney's fee of $200 an hour for work performed by associates in Ms. Hernandez's firm, and $50 an hour for paralegal work is well within the range of reasonableness for the Chicago market, considering the higher rates charged by Mr. Wolf's law firm for similar work. Defendant objects that Ms. Hernandez was awarded only $200 an hour for pre-trial work performed in two previous cases in this court, however such objections fail to establish that plaintiff's requested hourly rate of $225 is "unreasonable."

A. Paralegal services

Defendant objects to the inclusion of 35.40 hours of work performed by Miriam Hernandez Rios, a paralegal at plaintiff's counsel's law firm. Plaintiff requests $50 per hour on behalf of Ms. Rios for paralegal services she performed pursuant to this action. Defendant objects that Ms. Rios' work is better described as clerical or secretarial work, and therefore not recoverable at the rate requested by plaintiff. Ms. Rios' work consisted of compiling and summarizing financial information provided by defendant. Defendant cites a Supreme Court case in support of his objection, which states that "purely clerical or secretarial tasks should not be billed at a paralegal rate, regardless of who performs them." *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288 n.10 (1989). That same case, however, states that paralegals may perform valuable work which otherwise would be performed by an attorney and billed at a higher rate. It seems that defendant has concluded on his own behalf that Ms. Rios' work is clerical in nature. However, the following categories of work are mentioned by the Court as those which are customarily performed by a paralegal: "Factual investigation, including locating and interviewing witnesses; assistance with

depositions, interrogatories, and document production; *compilation of statistical and financial data*; checking legal citations; and drafting correspondence." *Id.* (emphasis added) Defendant's objection to this portion of plaintiff's attorney's fees is therefore overruled.

B. Trial preparation

Defendant also objects to the inclusion of $13,905 in attorney's fees for work performed in preparation for trial after the parties' joint submission of the proposed final pre-trial order. Defendant cites no cases in support of his contention that this was an unreasonable expenditure of time on plaintiff's part. Trial was scheduled to begin on April 6, 1998, and the court had reset the ruling date on plaintiff's motion for summary judgment to March 27, 1998. The court, however, entered summary judgment in favor of the plaintiffs on February 19, 1998. Plaintiff could have only reasonably expected a ruling on his motion for summary judgment on the date which was set by the court, which would have given plaintiff only nine days to prepare for what would have been a relatively long and involved trial. Therefore the court finds that it was eminently reasonable for plaintiff to begin preparing for trial before the court ruled on his motion for summary judgment.

C. Work performed with respect to Sharon Svec

Defendant objects to the reasonableness of awarding the attorney's fees which plaintiff seeks for time he spent in furtherance of pursuing his claims against Sharon Svec as a defendant in this action. Sharon Svec was served with the complaint and summons on August 27, 1997, and filed her answer in this case on September 17, 1997. However, Sharon Svec was dismissed from this case with prejudice on October 27, 1997. Because Sharon Svec is a co-owner of both Svec & Sons Funeral Home and West Suburban Livery, it was reasonable for plaintiff to initially join her as a defendant to

this action. Therefore, plaintiff's attorney's fees relating to Sharon Svec are reasonable and defendant's objection to them is overruled.

D. Excessive time spent at court hearings

Defendant objects to the amount of time spent by plaintiff's counsel at court hearings. In support of his assertion that the billable time should be reduced, defendant cites an opinion of this court in which Judge Bucklo reduced the amount of attorney's fees in a certain case by twenty-five percent because he apparently believed that the prevailing party's attorney was over billing for her time spent at court appearances. Defendant would ask this court to reduce plaintiff's attorney's fees by a similar proportion simply because most of the court hearings for which plaintiff attempts to recover fees exceed one hour. Notably, Judge Bucklo reduced the fees in her case because she noted that attorney Mary Elizabeth Halloran had billed exactly one hour for twelve of the fourteen court appearances which she made. *See Chicago District Council of Carpenters Pension Fund v. Sciortino Contractors. Inc.*, 934 F.Supp. 277, 279 (N.D. Ill. 1996). The court has no reason to suspect plaintiff's counsel of over billing for court appearances, especially since her billing records list court appearances of varying lengths. The court finds that plaintiff's account of time spent in court is generally reasonable.

II. COSTS

Defendant objects to some of the costs which plaintiff requests in this action. ERISA specifically provides for the award of costs to successful plaintiffs who fall under the provisions of 29 U.S.C. § 1132(g)(2). In determining whether costs should be awarded, a district court must determine whether the costs are reasonable and necessary to the litigation. *See McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990). Defendant objects to plaintiff's

request for expenses for cab fare, parking, a meal, a transcript from a National Labor Relations Board (NLRB) hearing, service of the summons and complaint on Sharon Svec, photocopying, postage charges, and Lexis computer research services. The court has already addressed the substance of defendant's objection to awarding the cost of the NLRB hearing transcript as well the cost of serving Sharon Svec with the summons and complaint.

The court agrees with defendant that plaintiff's request for $30.25 in cab fare and parking in connection with plaintiff's attorneys' travel to the courthouse is unreasonable. Ms. Hernandez's law firm is six blocks away from the federal courthouse—about a ten minute walk. The cost of taking a taxi or driving six blocks and parking is simply not a reasonable expense. The court, however, finds that plaintiff's attorneys' cab fare totaling $32 for travel to a photocopying service for the binding of documents and exhibits is reasonable due to the bulk of material which must be transported. The court also finds plaintiff's request for $39.89 for a meal to be unnecessary to this litigation.

Defendant also objects that the cost of photocopying plaintiff's motion for summary judgment is not taxable as a cost because it is not "necessarily obtained for use in the case" under 28 U.S.C. § 1920(4) (1998). However, these expenses are necessary for the filing of documents with the court, and are therefore taxable as costs. Furthermore, defendant's objection to the reasonableness of a per-page copy rate of $.25 is without merit. This court has held that such a rate is reasonable for the Chicago market in a previous case, *see Somat Corp. v. Somat Corp.*, No. 90 C 4943, 1993 WL 75155, *4 (N.D. Ill. March 15, 1993), and defendant has presented no evidence to the contrary which would establish that a $.25 rate is unreasonable. Defendant also objects to plaintiff's request for $9.50 in charges for sending a letter through the United Parcel Service. He is correct in stating

that postage costs are not recoverable, therefore they will be excluded from the court's award of costs. *See Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 216-17 (7th Cir. 1975). Defendant is also correct in stating that Lexis research fees are not recoverable as costs, but rather as attorney's fees. Therefore, this portion of plaintiff's request for costs will instead be awarded to plaintiff in the form of attorney's fees.

ORDERED: Judgment is entered in favor of plaintiff Thomas J. Moriarty and against defendant James F. Svec pursuant to the audit of Svec & Sons Funeral Home for the period January 1, 1987 through September 30, 1995, and against defendant James F. Svec pursuant to the audit of West Suburban Livery for the period October 1, 1993 through December 31, 1995, in the amount of $233,315.62. The judgment amount is comprised of the following damages:

A. Svec & Sons Funeral Home's delinquent Health & Welfare contributions for the period January, 1987 through April, 1993, on behalf of James F. Svec—$19,481;

B. Svec & Sons Funeral Home's delinquent pension contributions for the period January, 1987 through April, 1993 on behalf of James F. Svec—$13,246;

C. West Suburban Livery's delinquent Health & Welfare contributions for the period October 1, 1993 through December 31, 1995—$11,444;

D. West Suburban Livery's delinquent pension contributions for the period October 1, 1993 through December 31, 1995—$6,358.50;

E. Interest through March 4, 1998 on the delinquent contributions at the rate set forth in plaintiff's trust agreements—$42,091.08;

F. Twenty percent liquidated damages on the delinquent contributions—$10,105.90;

G. Audit fees—$6,688.27;

H. Attorney's fees—$120,928.48;

I. Costs—$2,972.39.

ENTERED:

/s/ George W. Lindberg
GEORGE W. LINDBERG
United States District Court

DATED: Mar. 24, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Sent For Microfilming
March 25, 1998

Case Number 96 C 7392

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED judgment is entered in favor of plaintiff Thomas J. Moriarty and against defendant James F. Svec in the amount of $233,315.62.

Michael W. Dobbins, Clerk of Court

/s/ Sandra L. Brooks
SANDRA L. BROOKS
Sandra L. Brooks, Deputy Clerk

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

2/26/1998
JUDGE GEORGE LINDBERG

Defendant West Suburban Livery's Motion for Reconsideration is denied. A motion for reconsideration may not be used to argue "matters that could have been heard during the pendency of the [motion for summary judgment]." *Caisse Nationale De Credit Argricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996). The arguments presented in defendant's motion could have been presented before plaintiff's motion for summary judgment was granted, therefore the court will not consider them now.

UNITED STATES DISTRICT COURT.
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

2/25/1998
JUDGE GEORGE W. LINDBERG

Motion for Reconsideration and/ or Clarification is denied. The court granted summary judgment in plaintiff's favor for all time periods stated in the complaint.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

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96 C 7392

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

2/19/1998
JUDGE GEORGE W. LINDBERG

Plaintiff's motion for summary judgment is granted. Plaintiff shall submit a proposed judgment to chambers no later than February 25, 1998. Defendants may submit a response objecting to plaintiff's computation of damages no later than March 4, 1998. ENTER MEMORANDUM OPINION AND ORDER.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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96 C 7392
JUDGE GEORGE LINDBERG

THOMAS J. MORIARTY,

v.

JAMES F. SVEC, *et al.*

MEMORANDUM OPINION AND ORDER

Plaintiff Thomas J. Moriarty, as one of the trustees of Local Union No. 727, I.B.T. Pension Trust ("Pension Fund"), and Teamsters Local Union No. 727 Health arid Welfare Trust ("Health & Welfare Fund") (collectively "the Funds"), brings this action against the defendants to enforce payment of delinquent contributions allegedly due to the Funds pursuant to collective bargaining agreements between the Funeral Directors Services Association of Greater Chicago (FDSA), of which Svec & Sons Funeral Home ("the Funeral Home") was undisputedly a member, and the Auto Livery Chauffeurs, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers and Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers and Wash Rack Attendants Union, Local No. 727, I.B.T. ("the Union"). Plaintiff has filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c) to order defendants to pay such allegedly delinquent contributions. The court will grant the motion for summary judgment *in toto*.

Plaintiff Moriarty brings this action on behalf of the Funds which are employee benefit plans set up to provide employment benefits to members of the Union whose employers are subject to collective bargaining agreements which require the payment of contributions on their employees' behalf. Defendants James F. Svec and Sharon Svec are the owners of the Funeral Home and West Suburban Livery (WSL), although James F. Svec runs both businesses as sole proprietorships under his control. At all times material to this action until December 14, 1995, the Funeral Home was a member of the FDSA which is an association of licensed funeral businesses providing funeral services, livery services, and funeral transportation services. The FDSA negotiates with the Union and enters into collective bargaining agreements on behalf of the FDSA's employer members, who are then bound by the terms of such agreements. The collective bargaining agreements (CBAs) provide that each employer member of the FDSA is obligated to contribute to the Funds for the work performed by their employees in the various classifications within the contractual bargaining unit.

Elmer Svec, who was James and Sharon Svec's father, died on June 29, 1987. Before Elmer Svec's death, he owned the Funeral Home as a sole proprietor, and owned fifty percent of WSL as a partner with his son, James Svec, who owned the other fifty percent of WSL. At Elmer Svec's death, his interest in the Funeral Home and WSL passed to his wife, Anne Svec for a period of time. Some time later, Elmer Svec's interest in the Funeral Home and WSL was divided equally between his two children, James and Sharon Svec, such that James now owns seventy-five percent of WSL and fifty percent of the Funeral Home, and Sharon owns twenty-five percent of WSL and fifty percent of the Funeral Home. On February 16, 1988, Anne Svec executed a disclaimer renouncing all her rights, title, and interest as a joint tenant in the real property upon which the Funeral Home is situated. On April 15, 1993, James and Sharon Svec each signed

documents evidencing receipt of their respective shares in the Svec & Sons Funeral Home business. The effect of the disclaimer of February 16, 1988, and of the documents signed on April 15, 1993, are disputed by the parties.

James Svec alleges that he became an owner of the Funeral Home on February 16, 1988, when he claims that his mother disclaimed her entire interest in the business whereupon it passed to him and his sister. Because James Svec was allegedly a "principal owner" of the Funeral Home for this time period, he claims that he does not fall under the definition of "employee" as stated in the CBAs, and therefore James Svec does not owe contributions to the Funds on his own behalf for work he performed during that time. James Svec also claims that he is not liable as a successor to his father, Elmer Svec, for contributing to the Funds pursuant to the CBAs in effect during Elmer Svec's sole proprietorship (here the relevant time period would be January, 1987 through June, 1987). Plaintiff claims that the CBAs require payment of contributions to the Funds on James F. Svec's behalf under the terms of the CBAs in effect from January 1, 1987 through September 30, 1995. Moriarty also states that even if the court were to find that "principal owners" were not "employees" as defined in the CBAs, James Svec was not a "principal owner" of the Funeral Home business until April 15, 1993, so that there would be no basis for defendant's claim that he was not an "employee" of the Funeral Home for the period from January, 1987 through April, 1993.

Plaintiff asserts that from October 1, 1993 through December 31, 1995, James F. Svec and Sharon Svec (WSL defendants) were contractually obligated under the terms of the CBAs to contribute to the Funds on behalf of the employees in the bargaining unit at WSL, which WSL defendants failed to do. Plaintiff claims that WSL is subject to the CBAS entered on behalf of the Funeral Home, and therefore contributions must be made to the Funds for the

work performed by its bargaining unit employees during the relevant time period. WSL defendants claim that WSL was never a member of the FDSA and was therefore never subject to any CBA which requires them to contribute on behalf of WSL's employees.

Plaintiff's prayer for relief states that James F. Svec owes $29,580 to the Health & Welfare Fund and $13,246 to the Pension Fund for work he performed as an employee at the Funeral Home. The complaint also states that WSL defendants owe $11,444 to the Health & Welfare Fund and $6,358.50 to the Pension Fund for work performed by the bargaining unit employees of WSL. Plaintiff asks the court to award the fees and cost of the audit which was necessary for bringing this lawsuit as well as his reasonable attorney's fees and costs of this action.

I. DELINQUENT CONTRIBUTIONS ON BEHALF OF JAMES F. SVEC

Summary judgment is appropriate when "no genuine issue as to any material fact" exists, and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding whether to grant summary judgment, the court construes the evidence and all inferences which can be reasonably drawn there from in the light most favorable to the nonmovant (defendants in this case). *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997). The Employee Retirement Income Security Act of 1974 (ERISA) provides in part that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with the law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (1997). In the instant case, there are a series of collective bargaining agreements entered between the FDSA and the Union which must be given effect. Defendant claims that the term "employee" in the CBAs is ambiguous, the interpretation of which requires a finding of fact, and therefore summary judgment is inappropriate. Plaintiff contends that the term "employee" is unambiguous and therefore the court must enforce the clear language of the CBAs as a matter of law.

"Summary judgment is particularly appropriate in cases involving the interpretation of written contracts." *ICEBU v. Hyster-Yale Materials Handling, Inc.*, 83 F.3d 930, 932-33 (7th Cir. 1996) (citing *Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989)). Where a contract is susceptible to only one reasonable interpretation, it is unambiguous, and the court must determine its meaning as a matter of law. *ICEBU*, 83 F.3d at 933. When interpreting contracts or collective bargaining agreements, the Seventh Circuit has held that:

> Although extrinsic evidence is admissible to show that a written contract which looks clear is actually ambiguous, perhaps because the parties were using words in a special sense, *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 620-21 (7th Cir. 1989), there must be either contractual language on which to hang the label of ambiguous or some yawning void . . . that cries out for an implied term.

Bidlack v. Wheelabrator Corp., 993 F.2d 603, 608 (7th Cir. 1993). James Svec does not argue that the term "employee" itself or its contractual definition is ambiguous, rather he argues that "[n]otwithstanding [the] seemingly clear language [of the CBA's definition of "employee"], 'principal owners' of FDSA members who perform funeral directing or embalming are not 'employees.' " Response brief, p. 12. "Employee" is defined in the CBAs covering funeral directors

and embalmers as "[a]ny member of the union who is in the employ of an employer member who is licensed to and who does embalming and/ or funeral directing or who is serving as a trainee embalmer or funeral director trainee." James Svec, for all times relevant to this case, has been a member of the Union, and has been licensed to do funeral directing and embalming and has done funeral directing for the Funeral Home. The Funeral Home has also been an "employer member" (member of the FDSA) during the relevant time period.

James Svec sites a case from this court which recites the testimony given at trial by plaintiff Moriarty regarding those who are required to contribute to the Funds as "employees" of FDSA members. In that case, Moriarty testified "to an industry practice that had been worked out between Association and Union, under which the principal owners of funeral homes that are Association members are not viewed or treated as 'employees' of the funeral homes for purposes of requiring contributions to Funds based on their compensation." *Moriatry v. Glueckert Funeral Home, Ltd.*, 967 F. Supp. 1038, 1045-46 (N.D. Ill. 1997) (Shadur, J.). As the court reads Judge Shadur's recitation of Moriarty's testimony in that case, it does not appear to establish that "employee" is an ambiguous term. It only shows that the FDSA received an oral promise from the Union whereby FDSA members are not required to satisfy the full scope of the language in the CBAs. Implicit in the "working out" of a deal between the FDSA and Union is the fact that the understanding at which the parties arrived is not tautological. Obviously the reasonable interpretation of "employee" in the CBAs was not the interpretation with which at least one of the parties was content—hence their negotiations. However, the job of this court is to interpret the language of the CBAs themselves, not to ascertain what one or both of the parties might have ideally included in their final agreement. The CBAs are renegotiated frequently, yet despite the purported oral agreement between

the FDSA and the Union, they have apparently never arrived at an agreement to specifically exclude principal owners from the definition of "employee" in the CBAs themselves.

Section 515 of ERISA provides that every employer who is obligated, according to the terms of a collective bargaining agreement, to contribute to a multiemployer plan shall "make such contributions in accordance with the terms and conditions of such plan or such agreement." 29 U.S.C. § 1145 (1997). For this reason, the Seventh Circuit has held that:

> If the employer simply points to a defect in its formation—such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law—it must still keep its promise to the pension plans.

Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148, 1153 (7th Cir. 1989) (en banc). Furthermore, § 515 of ERISA "prevents a court from giving force to oral understandings between union and employer that contradict the writings." *Id.* at 1154.

Defendant also cites the interpretation which the courts have given the term "employee" in the context of the National Labor Relations Act (NLRA) in an attempt to prove that "employee" is ambiguous. Under the NLRA, defendant James Svec states that owners, children of owners, and managers are exempted from the requirements of the statute. These exemptions, he maintains, establish the common usage of the term "employee" in the labor-management context. However, the language of the CBAs themselves controvert this assertion. Article II, Section 4 of the July 1, 1994 CBA for funeral directors and embalmers defines the work week and work day for employees in the bargaining unit. The 1994 CBA, which practically mirrors provisions in the previous CBAs which cover the relevant time period for this case,

specifically states that "the provisions set forth in this Section shall not apply to Managers, District Managers, Regional Managers and Area Managers." Plaintiff's Exhibit 9. If the labor-management context within which the CBAs were drafted was such that managers, owners, and children of owners were already exempted, then this particular language would be superfluous.

The language in Article II, Section 4 of the CBAs also defeats James Svec's assertion of ambiguity relating to the industry practice between the FDSA and the Union to which Moriarty testified in the case of *Glueckert Funeral Home, Ltd.* If the negotiators had wished to exempt owners from the requirement to contribute to the Funds, they could have done so quite easily as they did when exempting managers from the CBAs' work day and work week requirements, yet even the most recent CBA fails to include an exemption for principal owners. In ruling on a motion for summary judgment, the Seventh Circuit has held that:

> Although we owe [the nonmovant] the obligation to examine the record in the light most favorable to her, indulgence extends no further than the record before us. Once [the movant] made the preliminary showing that the was no dispute of material fact compelling a trial, the burden was [the nonmovants's] to identify evidence to the contrary.

Davidson v. Midelfort Clinic, Ltd., No. 96-2860, 1998 WL 3360, at *4 (7th Cir. Jan 7, 1998). Defendant has failed to present sufficient extrinsic evidence to prove that the term "employee" is ambiguous, therefore there is no material fact which is disputed concerning the issue of delinquent contributions owed to the Funds on behalf of James F. Svec. As shown above, James Svec satisfies the contractual definition of "employee" and is therefore liable for the

payment of delinquent contributions to the Funds for work performed on his own behalf [1].

II. SUCCESSOR LIABILITY

In a supplement to his summary judgment response brief, defendant James Svec presents this court with a recent decision of the Illinois Supreme Court which purportedly establishes that James Svec is not required to pay delinquent contributions to the Funds for the period during which Elmer Svec was the sole proprietor of Svec & Sons Funeral Home (the relevant time period for this case being January 1, 1987 through June 29, 1987). The case cited by defendant restates the common law rule in Illinois regarding successor liability, which has also been acknowledged by the federal courts: "The well-settled general rule is that a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation." *Vernon v. Schuster*, No. 82680, 1997 WL 778388, at *3 (Ill. Dec. 18, 1997) (citations omitted); *see also Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1325 (7th Cir. 1990). A successor corporation is, however, liable for the debts of its predecessor when (1) there is an express or implied agreement of assumption; (2) the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) the

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[1] Defendants, in their Response to Plaintiff's 12(m) Statement of Material Facts, respond to paragraph 32 of Plaintiff's 12(m) statement by objecting to the admission of Plaintiff's Exhibit 8, the Addendum to the March 1, 1992 through June 30, 1994 CBA covering Funeral Directors, Embalmers, Funeral Director Trainees, Trainee Embalmers and Trade Embalmers, because it is not properly authenticated. The affidavit submitted by plaintiffs of John Coli, Secretary-Treasurer of the Union, contains a clerical error purporting to establish that Exhibit 8 is an addendum to the 1989-1991 CBA rather than the 1992-1994 CBA. The applicable time period for the Addendum, however, appears on its face and is readily understood by the court.

purchaser is merely a continuation of the seller; or (4) the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Vernon v. Schuster*, 1997 WL 778388 at *3

However, "the Supreme Court and [the Seventh Circuit] have imposed liability upon successors beyond the bounds of the common law rule in a number of different employment related contexts in order to vindicate important federal statutory polices," *Artistic Furniture of Pontiac*, 920 F.2d at 1326, one of which is the recovery of delinquent multiemployer pension fund contributions under ERISA, *Id.* at 1327. An exception to the common law rule will be applied to vindicate an important federal statutory policy where "the successor has had prior notice of the liability in question, and where there has existed sufficient evidence of continuity of operations between the predecessor and successor." *Id.*

As to the issue of notice by the successor regarding the existence of collective bargaining agreements entered into by his predecessor, the Seventh Circuit has noted the "there is no question that the successor knows of any collective bargaining agreements that this predecessor has signed . . . ." *EEOC v. Vucitech*, 842 F.2d 936, 945 (7th Cir. 1988). Therefore, James Svec would be precluded from claiming that he had no knowledge of the CBAs to which his father was a party. Regarding continuity of operations, there appears to have been no change at all in the operation of Svec & Sons Funeral Home upon the death of Elmer Svec. In fact, it is undisputed that James Svec began managing the day-to-day operations of the Funeral Home himself prior to his father's death. The Funeral Home continued providing funeral services as well as livery services after James Svec and Sharon Svec assumed ownership of the Funeral Home, and apparently, the same work force continued in their employment regardless of the change in ownership. Normally, the exceptions to successor non-liability recited in

Artistic Furniture of Pontiac are used to determine successor liability when one corporation's assets are bought by another, presumably to avoid assuming the debts of the seller corporation. However, in the case, the court is not presented with such a scenario and it therefore becomes fairly easy in this instance to determine from the facts that there is indeed continuity of operations between the solo proprietorship of Elmer Svec and the partnership of James Svec and Sharon Svec. Indeed, if the instant case does not present a case of continuity of operations, then there are none which would satisfy this exception. James Svec is therefore liable as a successor to his father, Elmer Svec.

III. DELINQUENT CONTRIBUTIONS ON BEHALF OF WSL EMPLOYEES

Finally, plaintiff claims that delinquent contributions are due to the Funds for work performed by the employees of WSL in the bargaining unit. Plaintiff claims that even though WSL has never been formally a member of the FDSA, it is subject to the CBAs nonetheless because it is either an alter-ego of the Funeral Home, it has displayed an intent to be bound by the terms of the CBAs, or WSL and the Funeral Home are a single employer. The single employer test is dispositive in this case, therefore the court will not reach the other criteria raised by the plaintiff to establish WSL's liability. Courts will treat nominally distinct businesses as one when single employer status is established. When two businesses are actually a single employer, then both businesses will be equally liable under a collective bargaining agreement entered on behalf of only one of them. WSL and the Funeral Home will be considered a single employer if they comprise an integrated enterprise, the controlling criteria being: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, AFL-*

CIO, 425 U.S. 800, 802 n.3 (1976) (quoting *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965)).

WSL defendants concede that WSL and the Funeral Home are commonly owned and managed. Furthermore, as to the issue of centralized control of labor relations, it is undisputed that James Svec does the hiring and firing of all employees for both WSL and the Funeral Home, as well as deciding for which new employees contributions will be made. WSL defendants wish to make an issue of the fact that some of the paperwork relating to labor relations was handled by Sharon and Anne Svec (filing remittance reports to the Funds on behalf of Funeral Home employees, handling the payroll, and informing the FDSA of the Funeral Home's withdrawal). In support of their contention that this establishes decentralized control of labor relations, WSL defendants cite a Seventh Circuit case which applied the single employer test in a scenario involving a non-union sole proprietorship which entered into a licensing agreement with a unionized corporation for use of the latter's corporate name. In that case, *Trustees of Pension, Welfare and Vacation Fringe Benefit Funds of IBEW Local 701 v. Favia Electric Co., Inc.*, 995 F.2d 785 (7th Cir. 1993), Thomas Miniscalcos (Thomas) was the owner of the sole proprietorship and his wife, Mary Ann Miniscalcos (Mary Ann), was elected president and sole director of the corporation. Although the court found that Thomas handled the hiring and firing for both the proprietorship and the corporation, it found that Mary Ann handled the bulk of the paperwork for the corporation's dealings with the labor union. Contrary to WSL defendants' assertion, this particular holding does not support their position. The pertinent finding by the court was that some responsibility was divided between Thomas and Mary Ann respective to the particular company or corporation which they controlled. Here, James Svec owns both companies along with his sister, Sharon Svec—no formal division of

labor exists between them, nor do they perform duties which evidence any separation of responsibilities along company lines. Just because James Svec does not do all the work does not mean that control of labor relations within the two companies is decentralized. Indeed, it is undisputed by the parties that James Svec runs both businesses as if he were a sole proprietor—implying that he ultimately controls labor relations for both companies.

Regarding interrelation of operations between WSL and the Funeral Home, it appears that the left hand certainly knows what the right hand is doing. WSL operates out of the same building as the Funeral Home, and its office materials, besides a desk, can fit into a space the size of a briefcase. The Funeral Home, WSL and James Svec's apartment are all located in a single building on Cermak Road in Berwyn, Illinois. WSL does not pay rent for its office, but pays $1,000 a month for the use of the garage which also houses the vehicles owned by the Funeral Home. James Svec provides for the maintenance of the vehicles owned by both the Funeral Home and WSL in the same garage. As stated above, James Svec hires and fires employees for both the Funeral Home and WSL, and decides for which new employees he will make contributions to the Funds. James Svec also schedules and makes arrangements for livery services provided by both the Funeral Home and WSL. WSL has no single telephone line which has been designated for it, and WSL's telephone calls often come though the Funeral Home's telephone line. WSL also fuels and maintains proper oil levels for the Funeral Home vehicles. WSL maintains the grounds of the Funeral Home as well as providing some of the maintenance for the physical structures on the Funeral Home property, including the Funeral Home building itself. WSL is paid an indefinite amount from month to month for these services. In 1987, all of WSL's drivers were drivers employed by the Funeral Home. The Funeral Home operates vehicles of its own, however, when there is a need for

additional livery, the Funeral Home will use either WSL's services or the livery services of another company. From 1987 to 1994,[2] the amounts which were paid out from the Funeral Home to WSL generally increased while the amounts paid to other livery services generally decreased such that in the years 1990, 1991, 1993, and 1994, the amount paid by the Funeral Home to livery services other than WSL amounted to zero. WSL and the Funeral Home do maintain separate records and bank accounts however. Regardless of these last two factors, WSL and the Funeral Home still evidence a high degree of interrelation of operations.

The *Favia* court, after weighing the factors involved in the single employer test, states the following: "Finally, the two businesses were not commonly owned. Neither Thomas nor Mary Ann ever held any stock in Favia Electric. . . . Therefore, this factor stands strongly against the imposition of single employer liability." *Favia Electric Co., Inc.*, 995 F.2d at 788. In the instant case, WSL and the Funeral Home are owned by the same two people—James Svec and Sharon Svec. Although the balancing of the factors involved in the single employer analysis is a fact-specific inquiry, the factors in the instant case weigh so heavily in favor of single employer status, that no reasonable fact finder could render a judgment in WSL defendants' favor. "An issue of fact is genuine only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Smith v. Severn*, 129 F.3d 419, 426 (7th Cir. 1997). Accordingly, summary judgment is granted in plaintiff's favor regarding the obligation to pay delinquent contributions to the Funds for work performed by the bargaining unit employees of WSL.

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[2] The defendants failed to produce records for 1995.

ORDERED: Plaintiff Thomas J. Moriarty's motion for summary judgment is granted. Plaintiff shall submit a proposed judgment in chambers no later than February 25, 1998, which shall state the amount of unpaid contributions plus interest which is owed by defendants to plaintiff with affidavits to support the amount of plaintiff's reasonable attorney's fees and costs of this action, as well as to support the fees and cost of the audit performed by plaintiff. Defendants may submit a response objecting to plaintiff's computation of damages no later than March 4, 1998.

ENTERED:

/s/ George W. Lindberg
George W. Lindberg
United States District Court

DATED: Feb. 19, 1998

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7392
JUDGE LINDBERG

THOMAS J. MORIARTY,

Plaintiff,

v.

JAMES F. SVEC, *et al.*,

Defendant.

JOINT STIPULATIONS[1]

1. The Funeral Directors Services Association ("FDSA") is an association of approximately 250 licensed funeral businesses providing funeral, livery and funeral transportation services. The FDSA negotiates with the Union and enters into collective bargaining agreements on behalf of the FDSA's employer members, who are then bound by the terms of such agreements.

2. The Trustees' authority is derived from the Trust Agreements and the collective bargaining agreements.

3. Thomas J. Moriarty is one of four trustees of the Funds and served as Executive Director of the FDSA from at least 1962 through 1993.

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[1] By stipulating to the accuracy of the facts set forth herein, the parties do not concede to their relevancy or waive any other objection to their admissibility.

4. The FDSA and I.B.T. Local 727 ("Union") are signatories to a series of collective bargaining agreements. The collective bargaining agreements and amendments thereto provide that each employer member of the FDSA is obligated to contribute certain amounts to the Funds for the work performed by their employees in the various classifications within the contractual bargaining unit. Two of those classifications within the collective bargaining unit are funeral directors and embalmers.

5. The collective bargaining agreement at issue is the 1985-1988 collective bargaining agreement entered into between I.B.T. Local 727 ("Union") and the FDSA. A copy of this collective bargaining agreement is attached as Joint Exhibit "A". A copy of the Addendum to the Articles of Agreement for the period March 1, 1986 through June 30, 1988 covering Funeral Directors and Embalmers is attached as Joint Exhibit B.

6. Pursuant to the collective bargaining agreements and trust agreements, FDSA member businesses are obligated to make contributions to the Health & Welfare and Pension Funds on behalf of employees who perform covered work.

7. The Funds conduct payroll audits of FDSA businesses and other employers who the Funds believe to be legally obligated to remit contributions to determine whether these employers have made proper and accurate contributions to the Funds.

8. The audit reflecting the contributions that the Funds seek to recover in the present case was performed in 1996. A copy of this audit is attached as Joint Exhibit "C".

9. Thomas Moriarty testified in his deposition that before 1993, the Funds determined whether or not a person was an owner of an employer entity depending on whether the person had a significant or a substantial ownership interest in that operation. Ownership would vary depending on the individual

firm. For example, if there was a father and son business and the father had a 90% ownership interest and the son had a 10% ownership interest, the Funds would not consider the 10% ownership interest to be significant or substantial, and therefore, contributions would be due on behalf of the son. On the other hand, if a father held a 50% interest in a business, and his two sons each held a 25% interest, the 25% interest would be considered significant, and no contributions would be due on behalf of the sons. If a father and son each held a 50% interest in a business entity, then they both would be considered primary or substantial owners and no contributions would be due on their behalf. (P. 32, 33)

10. Thomas Moriarty testified at his deposition that it is his opinion as a Trustee that if Jim Svec was a 50% owner of WSL and Jim Svec worked fulltime as a funeral director for the Funeral Home, and he did not have any ownership interest in the Funeral Home at the time, that the Funeral Home would have to make contributions on Jim Svec's behalf. (P. 105-06).

11. James F. Svec II (hereinafter "Jim Svec") was a member of the Union from at least November, 1979 through December, 1995.

12. Elmer J. Svec was the father of James F. Svec. Elmer J. Svec acquired 100% ownership of the Svec & Sons Funeral Home ("Funeral Home") upon the death of his mother, Blanche Svec, in or about November, 1978.

13. Elmer J. Svec owned 100% of the Funeral Home from in or about November, 1973 until his death on June 29, 1987.

14. After Elmer Svec's death, Jim Svec inherited 50% of the Funeral Home, and his sister, Sharon Svec, inherited the other 50% of the Funeral Home.

15. Jim Svec became a licensed funeral director and embalmer in 1978 and has worked full-time as a funeral director at the Funeral Home since that time.

16. The Funeral Home was a member of the FDSA from at least 1979 through December, 1995. The Funeral Home gave the FDSA notice of its resignation in November, 1995 and the FDSA accepted the resignation in December, 1995.

17. The Funeral Home is not liable for contributions on behalf of Jim Svec after June 29, 1987.

18. In 1983 James Svec purchased West Suburban Livery ("WSL"). Prior to January, 1987, Elmer Svec and Jim Svec each owned a 50% interest in WSL. In or about January, 1987, WSL became an active business. Exhibit "D" is a copy of the Illinois Business Taxpayer Application for Registration that James and Elmer Svec filed with the Illinois Department of Revenue in or about January, 1987.

19. Jim and Elmer Svec wrote in the Illinois Business Taxpayer Application for Registration that WSL was to operate as a "funeral livery and limousine service". The purpose of WSL was to conduct non-funeral service types of livery business as well.

20. After Elmer Svec's death, Jim Svec and his sister Sharon Svec inherited equally Elmer's interest in WSL so that after Elmer's death Jim Svec owned a 75% interest in WSL and Sharon Svec owned a 25% interest.

21. The Funeral Home and WSL have always had separate federal employer identification numbers.

22. Since at least January, 1987, WSL and the Funeral Home have filed separate unemployment quarterlies with the State of Illinois for their respective employees.

23. Since at least January, 1987, WSL and the Funeral Home have filed separate income tax returns.

24. Since at least January, 1987, WSL and the Funeral Home have maintained separate workers compensation insurance policies.

25. Since at least January, 1987, the Funeral Home and WSL have had different telephone numbers.

26. Since at least January, 1987, the Funeral Home and WSL have had separate bank accounts.

27. Exhibit "E" is the District Court decision entered in this case on February 19, 1998.

28. Exhibit "F" is the Seventh Circuit decision entered on December 14, 1998.

29. Exhibit "G" is the Restated Agreement and Declaration of Trust for IBT 727 Health & Welfare Fund dated September 26, 1985.

30. Exhibit "H" is the Amendment to the Revised & Amended Agreement & Declaration of trust to IBT 727 Health & Welfare Fund dated August 29, 1989.

31. Exhibit "I" is the Resolution amending the Restated Agreement and Declaration of Trust for IBT 727 Health & Welfare Fund, effective May 1, 1995.

32. Exhibit "J" is the Restated Agreement & Declaration of Trust for the Pension Plan dated February 20, 1978.

33. Exhibit "K" is the Amendment to the Revised and Amended Agreement and Declaration of Trust of the IBT 727 Pension Trust dated August 29, 1989.

34. Exhibit "L" is the Third Amendment to the Revised and Amended Agreement and Declaration of Trust of the Pension Plan, IBT 727, effective May 1, 1995.

ARTICLES OF AGREEMENT

Covering Funeral Directors, Embalmers, Funeral Director Trainees, Trainee Embalmers, and Trade Embalmers

Agreement made and entered into as of this 1st day of July, 1985 by and between Funeral Directors Services Association of Great Chicago, (hereinafter referred to as the Employer) for and on behalf of its employer members and Auto Livery Chauffeur, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers and Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers and Wash Rack Attendants Union Local No. 727, an affiliate of the I.B. of T.C.W. and H. of A. (hereinafter referred to as the Union).

This Agreement is entered into by the interested parties in a mutual effort to promote and maintain equitable labor relations, to stabilize the industry, and to protect the best interests of those who are engaged in this industry.

ARTICLE I

SECTION 1. EMPLOYEE COVERAGE. The Agreement applies only to those employees who do embalming and/or funeral directing and to those employees serving as trainee embalmers or funeral director trainees.

SECTION 2. UNION RECOGNITION. The Employer agrees to recognize and hereby recognizes the Union as the sole collective bargaining agent for all employees covered by this Agreement. The Union shall be recognized as the sole agent of the employees negotiating contracts and the final handling of all grievances and disputes.

SECTION 3. UNION SECURITY. It shall be a condition of employment that all employees of employer members covered by this Agreement who are members of the Union in good standing on the date on which this Agreement is signed shall remain members in good standing and those who are not

members on the date on which this Agreement is signed shall, on the thirty-first day following the date on which this Agreement is signed, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after the date on which this Agreement is signed, shall on the thirty-first day following the beginning of such employment become and remain members in good standing in the Union.

SECTION 4. AUTHORIZATION FOR DEDUCTIONS. Each employer member agrees to deduct from an employee's pay all dues and initiation fees and pay such to the accredited officials of the Union for each and every employee who is a member of the Union provided, however, that the Union presents to the employer member written deduction slips signed by the employee covering a period not in excess of one year.

SECTION 5. REPORTING. The use of licensed personnel, other than licensed members of an employer member's management, to perform any function covered under this Agreement who is not a member of the Union shall be reported to the Union by the employer member.

SECTION 6. UNION GOOD STANDING. Any employee who fails to become a member of the Union or to maintain his membership in the Union in good standing as provided in this Agreement shall be discharged after seven (7) days written notice of said failure to the employer member from the Union.

ARTICLE II

SECTION 1. EFFECTIVE DATES OF AGREEMENT. This Agreement shall become effective July 1, 1985 and shall continue in full force and effect until June 30, 1988, and shall continue from year to year thereafter unless written notice of desire to amend, modify or terminate this Agreement is given

by either party hereto at least ninety (90) days prior to June 30, 1988, or at least ninety (90) days prior to June 30 in any subsequent year.

SECTION 2. YEARLY CONTRACT PERIODS. Wherever in this Agreement a specific contract year is referred to it shall be applied as follows:

First contract year	-	July 1, 1985 to June 30, 1986
Second contract year	-	July 1, 1986 to June 30, 1987
Third contract year	-	July 1, 1987 to June 30, 1988

SECTION 3. WEEKLY WAGE-SALARIED EMPLOYEES. The guaranteed minimum weekly wage to be paid a salaried employee shall be governed by the employee's professional classification in accord with the following:

1. Combination Illinois licensed embalmer-funeral director, who is the holder of a local license required in the city, town, or village in which the establishment of the employer member where he is employed is located

   or

   Combination Illinois licensed embalmer-funeral director who is employed at an establishment of an employer member which is located in a city, town or village which has no local license requirement:

   a. 1st year of full licensure in the first contract year..... $491.00
      1st year of full licensure in the second contract year..... $513.25
      1st year of full licensure in the third contract year..... $535.50
   b. 2nd year of full licensure in the first contract year $503.25
      2nd year of full licensure in the second contract year..... $526.00
      2nd year of full licensure in the third contract year..... $548.75

c. 3rd year of full licensure in the first contract year $522.25
3rd year of full licensure in the second contract year..... $546.00
3rd year of full licensure in the third contract year..... $569.75

d. 4th year of full licensure in the first contract year $551.00
4th year of full licensure in the second contract year $576.00
4th year of full licensure in the third contract year..... $601.00

2. Combination Illinois licensed embalmer-funeral director, but not the holder of a local license required in the city, town or village in which the establishment of the employer member where he is employed is located.

1st contract year..... $448.50
2nd contract year..... $468.75
3rd contract year $489.25

3. Illinois licensed embalmer only.

1st contract year..... $408.50
2nd contract year..... $427.00
3rd contract year $445.50

4. Illinois licensed funeral director only.

1st contract year..... $376.50
2nd contract year..... $393.50
3rd contract year $410.50

5. Illinois registered combination trainee embalmer-funeral director trainee (See Section 5 below)

1st contract year..... $352.82 ($7.67 per hour)
2nd contract year ..... $368.92 ($8.02 per hour)
3rd contract year..... $385.02 ($8.37 per hour)

SECTION 4. WORK WEEK, WORK DAY—DEFINED. The regular work week shall consist of forty (40) work hours, exclusive one (1) hour in each work day for meals, with two (2) consecutive days off in each week. One (1) of the consecutive two (2) day off periods in any two (2) weeks shall include a Saturday and Sunday or a Sunday and Monday. The regular work day shall start at 8:00 a.m., unless an employee is willing to agree with the employer member on his own initiative on another starting time. However, the work hours in each day shall be continuous work hours after the regular starting time or one agreed to by the individual employee. Meal periods, where provided for, shall be taken between the third and sixth hour on the job. In connection with the foregoing it is recognized that conditions of the industry may require that managers may not be in a position to have regular starting times and that they may be required to work in a non-continuous operation. Accordingly, in respect to these matters the provisions above set forth in this Section shall not apply to managers: provided that no employer member shall hereafter employ a manager which does not employ three employees covered by agreements with the Union, except that this proviso shall not apply to any employer member which designated a particular employee as a manager prior to July 1, 1966. The Employer and Union shall be promptly notified in writing by each employer member of the designation of any employee as a manager.

SECTION 5. WORK WEEK, WORK DAY—TRAINEE EMBALMERS AND FUNERAL DIRECTOR TRAINEES. The regular work week of trainee embalmers and funeral director trainees shall consist of five (5) eight (8) work hour days, exclusive of one (1) hour each day for meals, and one (1) four (4) work hour day. Time and one-half shall be paid for all work done after eight (8) hours in any one (1) day and after forty (40) work hours in any one (1) week.

SECTION 6. OVERTIME. Time and one-half shall be paid for all work done after eight (8) work hours in any one (l) day and after forty (40) work hours in any one (1) week. Overtime shall not be paid twice for the same hours worked. It is understood that this Section shall not apply to managers.

SECTION 7. SUNDAY AND HOLIDAY FUNERALS. Except in the case of an epidemic or contagious disease funeral, no funeral shall be permitted on a Sunday or a legal holiday described in Article III, Section 1. However, funerals of persons of the Jewish faith may be conducted on a Sunday in accord with the chart as agreed upon by the Employer and the Union on file in the offices of the Employer and the Union.

ARTICLE III

SECTION 1. HOLIDAYS. The following days shall be observed as holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. In addition, five (5) days, mutually agreed upon by the employer member and the employee, shall be recognized as holidays in respect to such individual employee. Each employee shall have a minimum of four (4) holidays off each year, unless of his own volition he chooses to work on any of the said four (4) holidays. An employee who works on any one (l) of these holidays shall be paid at the rate of time and one-half his regular day's pay, plus his holiday pay. However, if not required to work on such holiday he shall not suffer any reduction in his regular weekly wage rate by reason thereof. When a holiday falls on a Sunday and is officially celebrated on the following day, the day of official celebration shall be considered as the holiday for purposes of this Section. When a holiday, or optional holiday, falls on an employees regularly scheduled day off, or during his vacation period, he shall be given another day off or its equivalent in pay at straight time.

SECTION 2. VACATIONS. All employees (other than trade embalmers, trainee embalmers and funeral director trainees) shall receive two (2) weeks vacation (fourteen consecutive days) with full pay after one (1) year of employment with one employer member, three (3) weeks vacation with full pay after nine (9) years employment with one employer member and four (4) weeks vacation with full pay after fourteen (14) years employment with one employer member. Employees must take their vacation and shall not receive money or economic concession "in lieu of " an actual vacation. Employees who do not work an entire twelve-month period for an employer member shall receive a pro-rated vacation of one (1) day per month at full pay for each month worked, but only after having completed a six-month period of work for such employer member; an employee in this category, after completing six (6) months employment with an employer member, shall be entitled to the pro-rated vacation benefit for his full period of employment. However, employees who terminate their employment through their own initiative within the first twelve-month period shall not be entitled to a pro-rated vacation. Vacations for those employees who have worked for more than one (1) full year with an employer member and whose employment is terminated shall be pro-rated where applicable based on the original date of employment of the employee. Termination of employment entailing vacation rights during the first twelve-month period shall apply only to lay-offs. All qualified employees, by seniority, shall be entitled to select their vacation period between April 1 and November 1; however if any employee elects to select another period in the year and the employer member is willing, a different vacation period may be scheduled. Trainee embalmers and funeral director trainees shall receive one (1) week's vacation (seven consecutive days) with full pay after one (1) year of employment with one employer member, and two (2) weeks vacation (fourteen consecutive days) with full pay after two

(2) years of employment with one employer member. This provision applies only for a two (2) year period of training. When a holiday falls during an employee's vacation he shall be given another day off or an additional day's pay at straight time. In cases where an employee is entitled to a three (3) or four (4) weeks vacation the vacation weeks need not necessarily be consecutive.

SECTION 3. SEVERANCE PAY. A salaried employee with two (2) or more continuous years of employment with any one (1) employer member whose employment is severed through no fault of the employee shall be entitled to two (2) weeks severance pay at the weekly wage he was paid prior to the date his employment was severed. A salaried employee with ten (10) or more continuous years of employment with any one (1) employer member shall be entitled to three (3) weeks severance pay, and a salaried employee with fifteen (15) or more continuous years of employment with any one (1) employer member shall be entitled to four (4) weeks severance pay.

SECTION 4. JURY DUTY. An employee with one (1) or more continuous years of employment with any one employer member who is summoned and reports for jury duty, as prescribed by applicable law, shall be paid by the employer member an amount equal to the difference between the amount of wages the employee otherwise would have earned by working during straight-time hours for the employer member on that day, and the daily jury duty fee paid by the court (not including travel allowance or reimbursement of expenses), for each day on which he reports for or performs jury duty and on which he otherwise would have been scheduled to work for the employer member. The employer member's obligation to pay an employee for jury duty is limited to a maximum of ten (10) work days in any calendar year. In order to receive payment, an employee must give the employer member one week's prior notice that he has been

summoned for jury duty and must furnish satisfactory evidence that he reported for or performed jury duty on the days for which he claims such payment. The provisions of this Section are not applicable to an employee who, without being summoned, volunteers for jury duty.

SECTION 5. LICENSES All employees shall be responsible for the annual cost of their initial state and local area funeral director and/or embalmer licenses. In the event an employer member requires additional licenses for any employee, the cost of same shall be borne by the employer member.

SECTION 6. CHANGE OF WORK LOCATION DURING WORK DAY. The employer member is responsible for providing transportation in those instances where the employee changes work location during the course of the work day. The employer member is responsible for returning the employee to his original starting location at the end of the work day. In either of these instances, where the employee agrees to use his own vehicle, he shall be compensated in accord with the Internal Revenue Service Mileage Rate then in effect.

ARTICLE IV

SECTION 1. HEALTH AND WELFARE AND SICK LEAVE. Each employer member shall contribute to Teamster Local Union No. 727 Health and Welfare Fund, to be administered jointly by the Employer and the Union, the following:

On account of each salaried employee covered by this Agreement who is in the employ of such employer member and who is hired on a guaranteed work week basis:

In the period March 1, 1985, through February 28, 1986, the sum of two hundred eight dollars and fifty-cents ($208.50) per month. This amount shall continue thereafter except as adjusted pursuant to Section 4 of this Article.

SECTION 2. PENSION PLAN. Each employer member shall contribute to Local Union No. 727, I.B. of T., Pension Plan, to be administered jointly by the Employer and the Union, the following:

On account of each salaried employee covered by this Agreement who is in the employ of such employer member and who is hired on a guaranteed work week basis:

In the period March 1, 1985, through February 28, 1986, the sum of one hundred sixty-eight dollars and no cents ($168.00) per month. This amount shall continue thereafter except as adjusted pursuant to Section 4 of this Article.

SECTION 3. PENSION PLAN EXEMPTION. It is agreed that the provisions of Section 2 of this Article do not apply to trainee embalmers or funeral director trainees who commence to serve their traineeship on or after July 1, 1979. This exemption will apply only to the first year of employment as a trainee. The name of the trainee must be included on the monthly reporting form of the employer member, and shall be noted as "Trainee" with no contribution included.

SECTION 4. REOPENING. It is agreed by the Employer and the Union that Sections 1 and 2 of this Article will be automatically reopened on January 1, 1986.

SECTION 5. EMPLOYER ASSOCIATION AUTHORIZATION. By the execution of this Agreement each employer member authorized the Employer to enter into appropriate trust agreements necessary for the administration of such funds, and to designate the Employer Trustees under such agreement hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority. The employer members and the employees designate the Trustees of such funds to act on their behalf as their designee to offer the option of membership in a qualified health maintenance organization to the eligible employees covered by this collective bargaining Agreement.

SECTION 6. DELINQUENT PAYMENTS. It is also agreed that in the event any employer member is delinquent in the payment of its contribution to the Health and Welfare and Pension Funds created under this Agreement, in accordance with the rules and regulations of the Trustees of such Funds, the Union shall have the right to take such economic action, including strike, as it deems necessary until such delinquent payments are made. It is further agreed that the Trustees may require the payment as liquidated damages of an amount not to exceed ten percent (10%) of the delinquent payment or fifty dollars ($50.00) whichever is greater. Finally, it is agreed that in the event of any action indicated above, the employer member shall be responsible to the employee for losses resulting therefrom. In the event the Trustees of the Fund are required to retain legal counsel and/or accountants to collect delinquent payments to the Funds, the employer member shall be responsible for the payment of the legal fees, accountant fees and court costs if it is determined that the employer member was delinquent.

ARTICLE V

SECTION 1. ECONOMIC LOSS. Employees who have been receiving benefits and/or wage rates over and above those stated in the Agreement which expired June 30, 1985 shall continue to receive them hereunder, and shall receive in addition, all benefits and/or wage increases agreed upon and described in the present Agreement.

SECTION 2. SENIORITY. Seniority shall not prevail during the first three (3) month period in which an employee is hired by an employer member. However, if an employee is retained in continuous employment by the employer member after his first three (3) month period seniority shall prevail from his original date of employment by the employer member Said three (3) month period shall be the employee's probationary period. In any case where an employer member operates more than one establishment, an employee's

seniority shall be based on the employee's continuous period of employment with the employer member and not at any particular establishment operated by the employer member. Seniority applies only to vacations and lay-offs of employees. The last employee hired shall be the first laid-off in the event it becomes necessary to lay-off employees. Trainee embalmers and/or funeral director trainees shall be laid-off in any employer member operation before any licensed funeral director/embalmer shall have his professional services terminated. All employees returning from military service by induction going back to work for their former employer member shall be given credit for the time they put in military service.

SECTION 3. INTEGRATE SENIORITY. In the event of a merger or combining of an employer member funeral operation with that of another employer member funeral operation, the resultant new employer member funeral operation will integrate the seniority of all the employees of the former funeral operation, or operations, in the new operation in accord with the manpower requirements of the new operation, provided such employees are mentally and physically capable of carrying out the duties required of them and, in addition to giving credit for seniority purposes, will also give credit for vacation and severance purposes for length of service to the former operation.

SECTION 4. NOTICE OF TERMINATION OF EMPLOYMENT. Every steady employee, after one (1) year or more of continuous employment or with any one employer member shall be given two (2) weeks' notice, in writing, or its equivalent in pay before being dismissed or laid-off (discharge for cause excepted). Such employee shall be paid in full for all that is due him at the time of his dismissal or lay-off. Conversely, each such employee shall give his employer member two (2) weeks' notice, in writing, prior to terminating his employment. The Union, upon receipt of

complaint, in writing, shall cause charges to be filed against such employee for failure to give such notice and, when such charges are proven, cause the employee to be disciplined either by fine or suspension, for a minimum period of two (2) weeks.

SECTION 5. DISCHARGE FOR CAUSE. An employer member shall not discharge any employee without just cause, but in respect to discharge shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Employer and the Union, except that no warning notice need be given to an employee before he is discharged if the cause of the discharge is dishonesty, drunkeness, prohibited drug usage or disloyalty to the employer member. The warning notice as herein provided shall not remain in effect for a period of more than (9) months from the date of said warning notice. Any employee may request an investigation in relation to the warning notice. In cases where intentional gross misconduct and/or intentional unprofessional behavior which harms the employer member's reputation or public image is alleged, no additional warning notices shall be required provided said actions have occurred more than twice.

SECTION 6. PROTECTION OF DISABLED EMPLOYEES RIGHTS. Any employee who becomes disabled as a result of an illness or injury that is job related has a continuing right of re-hire. Any employee who becomes disabled as a result of an illness or injury that is not job related has a right to return to his previous state of employment for a period of one (1) year from the first date of missed work due to said disability, but may be extended to eighteen (18) months upon certification by an attending physician. The employer member may request and pay for a second opinion in connection with an extension of the one (1) year period. Any employee who is hired to replace a disabled employee shall be subject to being laid-off upon the return to work of the

previously disabled employee unless he no longer is the junior man in seniority in that particular job classification in which case the junior man shall be subject to lay-off. The employer at the time of hiring said employee shall advise the employee and the Union that said employee is being hired to replace a disabled employee. Any employee laid-off due to the return to employment of a previously disabled employee shall retain all rights of rehire under this contract as well as receiving any severence and notice of termination benefits provided herein. All determinations as to whether or not a disability is job-related shall be made at the time the employee leaves employment. In the event the parties are unable to agree, the matter shall be subject to the grievance procedure outlined in Article XI herein. A disabled employee may not return to work unless he is mentally and physically capable of carrying out the duties required of him. All questions relating to the ability of a previously disabled employee to return to work shall also be subject to the grievance procedure outlined in Article XI herein.

ARTICLE VI

SECTION 1. WORK CONDITIONS. Employees shall be required to assist in maintaining operations normal to the progress of the business of the employer member establishment and to perform such services as are necessary to keep the establishment in an orderly condition and preparation room in a clean and sanitary condition. They shall not however, be permitted to (1) do regular janitor or porter work; (2) wash, grease or clean automobiles; (3) repair work or maintenance work without the consent of the Union; (4) be required to furnish any equipment necessary in the performance of embalming. The provisions of (4) shall not apply to trade embalmers. In the event a question arises as to whether or not a specific job or duty falls under the scope of this Agreement, the employee is to perform such job or duty

at the request of the employer member following which he is to report same to the Union in writing.

SECTION 2. PROPER ATTIRE. An employee shall be required to furnish formal morning clothing, a suitable dark business suit, and appropriate accessories. The employer member shall provide and maintain any other special suits it may require; however, the employee shall furnish and maintain the accessories for such special suits. Trainee embalmers and funeral director trainees shall be exempt from furnishing formal morning clothing. Employees when engaged in duties that require them to meet the public within the employer member establishment or in the immediate and direct performance of duties outside the establishment shall be properly attired. Minimum standards in this connection include wearing a suitable suit, a dress shirt and appropriate tie.

SECTION 3. RESIDENCY. No employee shall be required to "live on the work premises" or reside on property owned, leased or under the control of the employer member. Employees who elect to "reside on the premises" may do so provided an arrangement mutually agreeable to the employee and the employer member shall be entered into.

SECTION 4. EMERGENCY WORK. In cases of emergency, steady employees of a firm may be used for service trips or pick-ups. An emergency under this Section is defined as an occasion wherein a steady employed Union chauffeur or embalmer is not available to make such service trip or pick-up. In cases of emergency as above stated and an employer member is unable to contact Union officials, the Union shall be notified the following work day.

ARTICLE VII

SECTION 1. WAGES-TRADE EMBALMERS. All trade embalmers shall be paid as follows: (1) for embalming, cosmeticing, dressing and encasketing the body of a deceased

person (six years of age or older) in one operation: a minimum wage in the first contract year of one hundred and seventeen dollars ($117.00); a minimum wage in the second contract year of one hundred and twenty-two dollars ($122.00); and a minimum wage in the third contract year of one hundred and twenty-seven dollars ($127.00); (2) a minimum wage of forty-five dollars ($45.00) for embalming, cosmeticing, dressing and encasketing the body of a deceased person up to the age of six years in one operation; (3) a minimum additional wage of twenty dollars ($20.00) for each embalming of the body of a deceased person (six years of age or older) which has been the subject of an autopsy; (4) a minimum wage of fifteen dollars ($15.00) for any work performed on the body of a deceased person received as a ship-in or any pre-embalmed body. The employer member shall furnish all necessary chemicals and expendable supplies pertaining to the procedure of embalming.

SECTION 2. WAGES—TRADE EMBALMERS—SPECIAL DUTIES. (1) Trade embalmers may negotiate a special wage for dermasurgery and restorative art work. (2) Minimum wage for being recalled to an employer member establishment, home or any other place for dressing and encasketing or laying out the body of a deceased person, or assisting in dressing and encasketing or laying out the body of a deceased person shall be ten dollars ($10.00).

ARTICLE VIII

SECTION 1. REEMPLOYMENT OF RETIREES. An employer member may employ an individual receiving a retirement pension from the Local Union No. 727, I. B. of T., Pension Plan provided said individual has attained sixty-five (65) years of age. Said retiree-employee may not work more than forty (40) hours in a calendar month and may only work for one employer member during that month. Retiree-employees may work either a four (4) hour or eight (8) hour work day and shall be paid in accord with the following.

Four (4) hour work day

First contract year.....$55.10
Second contract year $57.60
Third contract year $60.10

Eight (8) hour work day

First contract year.....$110.20
Second contract year $115.20
Third contract year $120.20

Retiree-employees may not perform any embalming duties and shall be restricted to funeral directing and funeral arranging duties only. No more than one (1) retiree-employee shall be utilized at each establishment of an employer member during a calendar month. Health and Welfare Plan and Pension Plan contributions must be paid on retiree-employees in accordance with the schedule provided by the Trustees of said Funds. Retiree-employees shall be subject to Article I, Section 3 of these Articles of Agreement. No retiree-employees shall be employed by an employer member unless the number of full time employees covered under this Agreement shall total the number of full time employees on the employer member's active payroll on the effective date of this Agreement. The employer member and retiree-employee shall notify the Union, the Employer and the Pension Fund of their intention to enter into an employment relationship prior to same. The employment and continued employment of retiree-employees is at the sole discretion of the employer member. Any employer member who violates the provisions of this Section shall forfeit its right to use retiree-employees for a period up to one (1) year in length. Any dispute as to whether the Agreement has been violated or concerning the appropriate penalty shall be subject to the grievance provisions of this Agreement.

ARTICLE IX

SECTION 1. WORK OBLIGATIONS. The Employer agrees that only licensed embalmers and/or licensed funeral directors shall do all work that properly comes under the jurisdiction, respectively, of the Illinois license of which they are the holder.

SECTION 2. GENERAL CONDITIONS. The Employer and the Union agree to cooperate in all matters pertaining to the best interest of the industry.

SECTION 3. JOINT COMMITTEE. The Employer and the Union agree to establish and operate jointly a Committee consisting of six members, composed of three Employer representatives and three Union representatives, to interpret, for purposes of this Agreement, the responsibilities and duties of personnel licensed and/or registered under the Illinois Funeral Directors and Embalmers Act or local area ordinances concerning the practice of funeral directing and embalming. In addition, the Joint Committee will consider and is authorized to act upon any matter referred to it by either the Employer or the Union. It is understood that this Committee shall investigate those instances which may constitute a hazard to the health and safety of employees, employer members and/or the general public.

SECTION 4. UNION BUSINESS. The Employer agrees that employees who are officers or representatives of the Union shall have the necessary time off duty, without pay, to attend to Union business which cannot reasonably be handled outside of working hours, providing such absence for attendance of Union conferences or meetings shall not seriously hurt the employer member's business.

ARTICLE X

SECTION 1. NO GENERAL STRIKE OR LOCKOUT. It is agreed by the Employer and the Union that the Union shall

not engage in a general strike against the Employer and employer members and there shall be no lock-out against the Union or the employees during the term of this Agreement, except as provided for in Section 6 of Article IV, Section 3 and Section 4 of Article X, and Section 1 and Section 3 of Article XI.

SECTION 2. CONTRACT VIOLATIONS. No employer member or employee shall make any written or oral contracts or agreements that in any way conflict with either the wage or fringe benefits established by this Agreement. It is additionally agreed that no employee shall be paid less wages than those outlined in this Agreement and any employee who makes any economic concessions, rebates or discounts, or performs duties over and above those required by the terms of this Agreement, shall be considered as working below the Union scale and shall lose his good standing in the Union.

SECTION 3. PROTECTION OF EMPLOYEES' RIGHTS. There shall be no Article or provisions in this Agreement prohibiting the Union from engaging in strike or other economic actions whenever the Union deems it necessary to protect the guarantees and intents embodied in this Agreement and also to protect the employees' rights not to perform jobs not within the jurisdiction of this Agreement, except that the employees may perform jobs the same as or substantially similar to those covered by this Agreement for employers who have a substantially similar Agreement with the Union. The representative of the Employer or the Union shall have the right to resort to arbitration under the arbitration provisions of this Agreement in respect to any dispute which may or has given rise to action as set forth above.

SECTION 4. PROTECTION OF INNOCENT EMPLOYER MEMBERS. In the event the Union undertakes to engage in action pursuant to Section 3 of Article X against any particular employer member or group of employer members

where such action will affect the normal operations of another employer member which is independent of the employer member or members involved in the grievance, dispute or contract interpretation giving rise to such prospective action under Section 3 of Article X and where such other independent employer member is an innocent third party in respect to such grievance, dispute or contract interpretation, the Union shall, at least ten (10) days prior to engaging in such action protected in Section 3 of Article X notify the representative of the Employer. The Employer representative shall thereafter have the right to resort to the grievance-arbitration procedures set forth in Article XI to attempt to resolve the grievance, dispute or contract interpretation involved. If after the ten (10) day notice period has elapsed, there has been no satisfactory resolution of such grievance, dispute or contract interpretation, the Union shall be free to engage in action protected in Section 3 of Article X irrespective of the effects of such action upon the innocent employer member or members. The Union shall not be required to give a second notice in respect to any employer member or members where the same or substantially similar grievance, dispute or contract interpretation arises after one such notice has been given.

ARTICLE XI

SECTION 1. GRIEVANCE DEFINED. For the purposes of this Agreement, the term "grievance" shall mean any difference or dispute growing out of this Agreement or interpretation of this Agreement between the Employer, the Union, an employer member, or an employee. Failure to promptly pay wages and/or employer contributions to the Health and Welfare and Pension Funds is not considered a subject for the grievance or arbitration machinery.

SECTION 2. GRIEVANCE PROCEDURE. The procedure for the expeditious processing of all grievances shall be as follows:

1. The Union and the aggrieved employee, or the Employer and the aggrieved employer member, shall present a grievance to the opposite party not later than ten (10) working days after the subject of the grievance arises and same should be attempted to be settled at the scene of the occurence.
2. If the grievance is not satisfactorily settled within five (5) working days after the start of the preceding step, the employer member or the Union shall verbally contact the Executive Director of the Employer who shall attempt to resolve the grievance.
3. If the grievance is not satisfactorily settled in the preceding step within (5) working days, the grievance shall be reduced to writing by the representative of the aggrieved party and a copy of same served on all other parties. The grievance shall then be considered by the Grievance Board which shall meet as promptly as possible but not later than ten (10) working days after the filing of the written grievance report. A majority vote of four of the members of the Grievance Board shall determine the decision of the Board which shall be final and binding on the Employer, the Union, the employer member and the employee. The grievance shall not be disposed of if there is a failure to obtain a majority vote.

SECTION 3. ARBITRATION. If a grievance is not finally disposed of by the Grievance Board, and either the Employer or the Union desires formal arbitration, the party desiring arbitration shall immediately serve notice of the demand for arbitration on all other parties involved. The Grievance Board shall then select an impartial arbitrator who shall meet jointly with the Grievance Board, hear the grievance and render a decision on same, in writing, which shall be final and binding on all parties. The arbitrator and the Grievance Board shall have jurisdiction and authority only to interpret, apply or

determine compliance with the provisions of this Agreement and shall have no authority to add to, detract or alter in any way the provisions of same. Unless the time limits set forth in this Article are extended or waived in writing, failure to comply therewith will constitute a waiver of the grievance. The loser of any case left to the decision of an arbitrator for decision shall bear the full cost to both parties of arbitration expenses and general expenses, but this shall not include the expenses of the other party's legal counsel. The Employer and the Union agree that there shall be no strike, lockout, tie-up or legal proceedings without first using all possible means for settlement as provided for in this Article. It is agreed that all decisions rendered by the impartial arbitrator or the Grievance Board shall be final and binding upon all parties hereto. If the decision is not complied with the aggrieved party may take economic action, including strike, upon two (2) days formal written notice.

SECTION 4. GRIEVANCE BOARD. The Grievance Board shall be a permanent Board composed of three representatives of the Employer and three representatives of the Union. The three Employer representatives shall be designated by the Board of Directors of the Employer and the three Union representatives shall be designated by the Executive Board of the Union. The Employer and the Union will notify the other party of the names of their representatives within thirty (30) days of the execution of this Agreement.

ARTICLE XII

DEFINITIONS. For the purposes of this Agreement, the following terms shall have the following definitions:

1. Employer - Funeral Directors Services Association of Greater Chicago, an Illinois corporation.

2. Union - Auto Livery Chauffeurs, Embalmers, Funeral Directors, Apprentices, Ambulance Drivers and Helpers, Taxicab Drivers, Miscellaneous Garage Employees, Car Washers, Greasers, Polishers and Wash Rack Attendants Local Union No. 727, an affiliate of the I.B. of T.C.W. and H. of A.

3. Employer Member - Any member in good standing of Funeral Directors Services Association of Greater Chicago.

4. Employee - Any member of the Union who is in the employ of an employer member who is licensed to and who does embalming and/or funeral directing or who is serving as a trainee embalmer or funeral director trainee.

IN WITNESS WHEREOF the parties hereto have hereunto affixed their signatures this tenth day of November, A.D., 1985; at Chicago, Illinois.

FOR THE EMPLOYER	FOR THE UNION
/s/ Robert W. Ahlgrim ROBERT W. AHLGRIM President	/s/ Edward Madura EDWARD MADURA President
/s/ Lawrence A. Panozzo LAWRENCE A. PANOZZO Secretary-Treasurer	/s/ James Coli JAMES COLI Secretary-Treasurer

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF MARISEL A. HERNANDEZ

I, Marisel A. Hernandez, state as follows under oath:

1. I received my Juris Doctorate degree from New York University School of Law in 1982, and am an attorney licensed to practice in Illinois (1985) and New York (1983), the Northern District of Illinois, the Southern District of New York, and the United States Court of Appeals for the Seventh Circuit.

2. The law firm of Jacobs, Burns, Orlove, Stanton & Hernandez (hereafter "JBOSH" or "firm") and its predecessors has been in existence since approximately 1930. From its inception, the firm has dedicated itself virtually exclusively to the representation of labor unions, their members and multiemployer employee benefit funds. The firm has represented the above named entities on at least forty occasions before the United States Courts of Appeals throughout the United States. Consistent with its dedication to the "labor movement", JBOSH charges these clients a rate that is less than could be secured by lawyers in the Chicago metropolitan region.

3. I was employed as a trial attorney by the National Labor Relations Board in New York and Chicago from February, 1983 through December, 1985 where my duties consisted of investigating and litigating claims of unfair labor practices. I was subsequently employed as a senior trial attorney by the U.S. Equal Employment Opportunity Commission from December, 1985 through December, 1988 where I litigated Title VII claims before the U.S. District Courts in Northern and Southern Illinois. From December, 1988 through the present I have been employed by JBOSH, where since January, 1996 I have been a partner. I concentrate in the areas of ERISA, union representation and employment

discrimination. I have handled numerous matters in federal courts involving labor and ERISA issues. I also serve as counsel to public and private benefit funds in which I advise them on day to day matters regarding all aspects of benefit funds and employment issues. I mediate employment disputes between private litigants and serve on the U.S. Postal Service mediation panel. I have lectured to a variety of legal and other professional and non-professional groups and organizations on the subject of labor and employment law, and am also a member of the International Foundation of Employee Benefit Plans.

4. I have represented plaintiffs in a number of trials in the United States District Court for the Northern District of Illinois, have appeared before the Seventh Circuit, and have argued orally before the Illinois Appellate Court. In September, 1996 and March, 1997, I served as co-counsel in two jury trials in which this firm represented the Plaintiffs: *Talbott v. Empress River Casino Corporation,* No. 95 C 5317, before Judge Suzanne B. Conlon and *Dubin v. LaGrange County Club,* No. 95 C 5316 before Judge Charles P. Kocoras. In both the *Talbott* and *Dubin* cases, the court awarded me attorney's fees at the rate of $200 per hour and a trial hourly rate of $225. In March, 1998, Judge George W. Lindberg awarded me $225 per hour in the same matter that is before the Court today. (A copy of that decision and award is attached as a separate exhibit.) In February, 1999 I served as co-counsel for the plaintiff in a four day FLSA bench trial before Judge Milton I. Shadur, entitled *Cunningham v. Gibson Electric Co.,* No. 97 C 7170, in which Judge Shadur awarded me $225 per hour. In June, 1999 I was co-counsel in an ERISA bench trial before Judge Martin C. Ashman in the case entitled *Stone v. Eskaby Construction, Inc.,* No. 96 C 9429. Although the plaintiff was completely successful on the liability stage, the court has not yet awarded attorneys' fees until all issues regarding damages have been resolved.

5. Joseph M. Burns is the managing partner of JBOSH and the responsible billing attorney for all work performed on behalf of the Plaintiff Funds. He graduated from Loyola University School of Law in 1979. An equity partner in the firm, he has represented union clients and their members in a variety of matters, both in federal court, state court and in arbitrations. He has been extensively involved in representing employee benefit funds since 1979. Joseph Burns is admitted to practice before the U.S. Circuit Court of Appeals for the Seventh Circuit and the U.S. District Court for the Northern and Central Districts of Illinois. Mr. Burns is Fund Counsel to public and private sector funds. As counsel to the public sector fund and to Taft-Hartley/ERISA plans, he has extensive experience with state and federal laws governing the operation of pension plans. He has litigated bench and jury trials in circuit court and federal district court, argued in the appellate court, and tried cases before state administrative agencies. Mr. Burns has extensive experience in arbitrating complex labor and ERISA/withdrawal liability cases. He has testified as a witness for the U.S. Attorney's office as to the operation and administration of employee benefit funds under ERISA. He is a member of the National Association of Public Pension Attorneys and the International Foundation of Employee Benefit Plans.

6. Charles Orlove is an equity partner in JBOSH. He attended DePaul law school, was admitted to practice in Illinois in 1960, and joined JBOSH in 1967 after having worked as a trial attorney for the National Labor Relations Board for five years. Mr. Orlove is also admitted to practice before the United States Supreme Court, several U.S. Courts of Appeals, including the Seventh Circuit, as well as the Northern District of Illinois and the Northern District of Indiana. Mr. Orlove concentrates in traditional labor law representing unions and union represented employees, and has practiced extensively before federal and state courts, as well as a number of state and federal administrative agencies.

He has also represented various ERISA funds, including the IBT 727 Funds, and has litigated ERISA matters in federal court, the last having been *Moriarty v. Glueckert*, Case No. 95 C 2848.

7. In March, 1999, JBOSH received a list of hourly rates for the years 1995 through 1999 charged by attorneys from Jenner & Block, who represented the defendant in an ERISA matter before the Northern District of Illinois and the Seventh Circuit entitled *Moriarty v. Glueckert*, Case No. 95 C 2848, in which JBOSH represented the Plaintiff, and which attests to the higher rates which other attorneys representing multiemployer plans in the Chicago market are charging. These rates are as follows:

Attorney Name	Year Admission	Billing Year	Hourly Billing Rate
Kenneth R. Dolin	1981	1995	$265
		1996	$275
		1997	$290
		1998	$325
		1999	$345
David K. Haase	1989	1998	$255
		1999	$285
Gerald A. McInnis	1990	1997	$200
		1998	$225
		1999	$250
Ileana H. Kutler	1997	1998	$165
Catherine P. Wassberg	1986	1996	$230
		1997	$250
		1998	$270
Alex V. Barbour	1981	1996	$270
Thomas M. Wilde	1993	1996	$135
		1996	$150

Thomas K. McQueen	1974	1995 1996	$265 $275
John M. Vande Walle	1998	1998	$135

Jenner & Block also submitted hourly rates it charges its clients for its paralegals and project assistants. These are as follows:

Paralegal	**Billing Year**	**Hourly Rate**
Stephen W. Coy	1996	$95
Lisa L. Clay	1997 1998 1999	$95 $95 $100
Project Assistant	**Billing Year**	**Hourly Rate**
Robert Blazejowski	1997 1998	$55 $60
Eulalia V. De La Rosa	1998 1999	$60 $65

8. In light of the experience of the JBOSH attorneys who expended time in this matter, the complexity of this ERISA litigation, the prevailing market rate for attorneys of similar experience as outlined in ¶7 above, the successful results obtained, twice before this Court and once on appeal, and cases such as *People Who Care v. Rockford Board of Education,* 90 F.3d 1307, 1310, 1312 (7th Cir. 1996) and *Central States Pension Fund v. Central Transport, Inc.,* 76 F.3d 114, 116-117 (7th Cir. 1996), which advocate the market rate for attorneys who commit themselves to represent the not-so-privileged, I believe that a reasonable market rate for myself is $315 per hour, for David Allen, Joseph M. Burns and Charles Orlove is $345 per hour, for Sherrie E. Voyles is $250 per hour, and for the firm's paralegal, Linda Tate, is $100 per hour. The affidavits of David S. Allen, Sherrie E.

Voyles and Linda Tate are attached as separate exhibits in support of Plaintiff's petition for fees.

9. I am the primary attorney responsible in this litigation brought under the Employee Retirement Income Security Act of 1974 to collect delinquent contributions. I have reviewed firm's time records in this suit. All the attorneys and paralegals in our firm maintain contemporaneous time records which are transferred on a monthly basis to the firm's central computer data base which is then billed to the Funds. Attached as a separate exhibit is a detailed summary of the time devoted by JBOSH to the prosecution of this lawsuit. The initials "MAH" refer to Marisel A. Hernandez; "JMB" refer to Joseph M. Burns; "CO" refers to Charles Orlove, "DSA" refers to David S. Allen, "SEV" refers to Sherrie E. Voyles, and "LT" refers to Linda Tate.

10. Since February 24, 1998, the firm has spent a total of 426.7 hours, of which 418.7 hours are being charged in telephone conferences; office conferences; drafting correspondence; attending court status hearings and motion calls; drafting motions; research and drafting the appellate brief, preparing for and orally arguing same; preparing for and attending depositions; researching and drafting Plaintiff's Motion for Summary Judgment and its reply; researching and drafting Plaintiff's Response to Defendants' Motion for Summary Judgment; and preparing the Judgment Order and its affidavits, calculating damages and preparing exhibits. A detailed summary of the billing time expended for the period February 24, 1998 through September 10, 1999 is attached hereto in a separate exhibit, along with the lexis research dates and amounts.

11. The following lexis research charges were necessarily incurred, and the following persons performed services in this litigation for the period February 26, 1998 through September 10, 1999. The amount charged to these persons and for which we seek compensation is as follows:

Name	Hours	Rate	Amount
Marisel A. Hernandez	272.5	$315	$ 85,837.50
Joseph M. Burns	.5	$345	$172.50
David S. Allen	136.1	$345	$46,954.50
Charles Orlove	.5	$345	$172.50
Sherrie E. Voyles	1.1	$250	$275.
Linda Tate	8.0	$100	$800.
Lexis Research			$1,287.31
Sub-Total	418.7		$135,499.31

12. If the Court grants both the hours and hourly rate requested for the period February 25, 1998 through September 10, 1999, the Funds will be entitled to an attorney fee award for this period of time in the amount of $135,499.31. To this amount will be added the March 24, 1998 attorneys' fee award of $120,928.48 in this matter covering the period August 14, 1995 through February 24, 1998, for a total **attorneys' fees of $256,427.79.**

13. Attached as a separate exhibit is a list specifying the allowable costs and expenses the JBOSH firm incurred on behalf of the Funds in the prosecution of this lawsuit that were paid between February 26, 1998 through September 10, 1999, which totals $1,479.61. Although Plaintiff incurred far more copying costs, Plaintiff is requesting reimbursement only for the reproduction costs that were necessarily obtained for use in Plaintiff's second Motion for Summary Judgment in this case. These copying costs do not include copies made for the convenience of counsel, but solely for the court. In addition, the transcript costs requested are pursuant to the rates established by the Judicial Conference, *Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445, 455-457 (7th Cir. 1998). These transcript testimony was necessary for the

Plaintiff's Motion for Summary Judgment, in defense of Defendant's Motion for Summary Judgment, and would have been crucial for trial, if trial would have been necessary. The Court on March 24, 1999 had awarded the Plaintiff $2,972.39 in costs paid during the period August, 1995 through February 24, 1998. Thus, the total amount of reimbursable **costs** is **$4,452.00.**

14. There have been no further **audit fees** incurred after February 24, 1998. In the March 24, 1999 Judgment, the Court had approved and entered audit fees in the amount of **$6,688.27.**

15. The delinquent contributions for which the Defendant is liable with regard to Svec & Sons Funeral Home is $1,351 in health & welfare contributions and $1,038 in pension contributions for the period January, 1987 through June, 1987. These amounts are based on the contractual contribution rates as set forth in the 1985-1988 collective bargaining agreement between the Funeral Directors Services Association of Greater Chicago and IBT Local 727, and its addendums, which specifies that for the period March, 1986 through February, 1987, for funeral directors the health & welfare contribution rate is $218.50, and the pension contribution rate is $173.00 per month. For the period March, 1987 through February, 1988, the monthly health and welfare contribution rate is $228.50 and the pension contribution rate remained the same. With regard to West Suburban Livery, the Court had entered a judgment in its March 24, 1999 order for the period October 1, 1993 through December 31, 1995 in the amount of $11,444 for health and welfare contributions and $6,358.50 for pension contributions. This amount remains unchanged. Therefore the total amount of **delinquent contributions** amount to **$20,191.50.**

16. **Liquidated damages** are 20% of the delinquent contributions, or **$4,038.30.**

17. Interest has been calculated pursuant to the terms of the Trust Agreements, as described more specifically in the affidavit of Linda Tate, and attached as a separate exhibit. **Interest** on the delinquent contributions amounts to **$15,386.53.**

18. The **total attorneys fees and costs**, which plaintiff requests and believes are fair, reasonable and at the amount to **$267,568.06.**

FURTHER AFFIANT SAYETH NOT

/s/ Marisel A. Hernandez
MARISEL A. HERNANDEZ

Subscribed and Sworn to before me this 10th day of September 1999.

/s/ Anne Marie Salemi
ANNE MARIE SALEMI
Notary Public

[Filed Sep. 16, 1999]

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF MARISEL A. HERNANDEZ

Marisel A. Hernandez, being duly sworn, deposes and states as follows:

1. This affidavit supplements the affidavit I submitted to this court on September 10, 1999.

2. At Jacobs, Burns, Orlove, Stanton & Hernandez, we charge the client one blended rate for the work that is performed on behalf of that client, regardless of the years or experience of the attorney who performs that work. In the case of the IBT 727 Pension and Health & Welfare Funds, that rate is $165 an hour.

3. In addition to the work I describe in my affidavit, since I began my employment with Jacobs, Burns, I also engage in collective bargaining, litigate before state labor boards, and the Department of Labor, litigate various contractual issues before arbitrators, and counsel clients regarding general labor matters, ranging from negotiation severance agreements to wrongful discharge matters.

4. Joseph M. Burns and David Allen have litigated complex withdrawal liability cases before the district courts and the courts of appeals invoving the Multiemployer Pension Plan Amendements Act of 1980 ("MPPAA"), including *Chicago Truck Drivers Pension Fund v. Leaseway Transportation Corp.*, 76 F.3d 824 (7th Cir. 1996); *Chicago Truck Drivers Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995); *Board of Trustees v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994); *Chicago Truck Drivers Pension Fund v. Slotky*, 9 F.3d 1251 (7th Cir. 1993); *Central States Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993); *Trustees of the Chicago Truck Drivers Pension Fund v.*

Rentar Industries, Inc., 951 F.2d 152 (7th Cir. 1991); *Trustees of the Chicago Truck Drivers Pension Fund v. Central Transport, Inc.*, 935 F.2d 114 (7th Cir. 1991).

5. The affidavit of Charles B. Wolf is submitted and attached hereto in further support of Plaintiff's petition for attorneys' fees.

WHEREFORE AFFIANT SAYETH NOT.

/s/ Marisel A. Hernandez
MARISEL A. HERNANDEZ

Subscribed and Sworn to before me this 16th day of September 1999.

/s/ Anne Marie Salemi
ANNE MARIE SALEMI
Notary Public

[Filed Sep 16 1999]

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF CHARLES B. WOLF

CHARLES B. WOLF, being first duly sworn on oath, deposes and states that if called as a witness I would testify as follows based on my own personal knowledge.

1. I am an attorney and partner of the Chicago law firm of Vedder, Price, Kaufman & Kammholz, which is located at 222 North LaSalle Street, Suite 2600, Chicago, IL 60601.

2. I received my Juris Doctorate degree from the University of Chicago in 1975, and am admitted to practice in the U.S. District Court for the Northern District of Illinois, including the trial bar (1975), the Eastern District of Wisconsin (1977), the U.S. Courts of Appeals for the Seventh Circuit (1978), the Fourth and Eleventh Circuits (1984), the Sixth Circuit (1985), the Fifth Circuit (1987) and the Ninth Circuit (1990), and the United States Supreme Court (1985).

3. Vedder, Price, Kaufman & Kammholz has represented a number of multiemployer pension plans in various legal matters, including withdrawal liability litigation under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), including the Trustees of Iron Workers Local 473 Pension Trust. I personally represent employers and multi-employer benefit plans in the labor, employment and employee benefits area. I have had extensive experience in employee benefit plan design and administration, executive compensation, collective bargaining, NLRB and arbitration proceedings, employment discrimination cases, wrongful discharge cases and general labor and employment law matters. I have written a number of professional publications, and am co-author of the treatise,

ERISA Claims & Litigation, and have lectured extensively to business and professional groups.

4. At Vedder, Price, Kaufman & Kammholz, we use a billing rate that reflects the attorney's number of years practicing law, together with their experience in their area of practice, such as ERISA and labor.

5. Vedder, Price, Kaufman & Kammholz bills my time to our multiemployer pension plan clients at the rate of $310 per hour. This hourly rate is the firm's usual and customary rate for my services for all matters, including withdrawal liability litigation. We also charge lower rates for associates and partners with less experience. For example, Vedder, Price, Kaufman & Kammholz bills for an attorney in my firm who was licensed in 1983 and concentrates in ERISA at the hourly rate of $290; for an attorney in my firm licensed in 1990 and who concentrates in ERISA and labor the hourly rate would range between $245 to $260 an hour. We believe that our rates are reasonable given the prevailing rates in the greater Chicago metropolitan area.

FURTHER AFFIANT SAYETH NOT

/s/ Charles B. Wolf
CHARLES B. WOLF

Subscribed and Sworn to Before me this 16th day of September, 1999.

/s/ Diane M. Huntington
DIANE M. HUNTINGTON
Notary Public

DECLARATION OF DAVID J. MATHEWS

I, David J. Mathews, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that the following statements are true and correct and based upon my personal knowledge:

1. I have been admitted to practice law in the State of Illinois since 1974.

2. I received my B.A. from Pennsylvania State University and my J.D. from Villanova University.

3. I am a partner at the law firm of Carmell Charone Widmer Mathews & Moss Ltd.

4. Carmell Charone Widmer Mathews & Moss Ltd. regularly provides legal services for multi-employer pension funds, including the litigation of actions to recover delinquent contributions to health and welfare and pension plans pursuant to ERISA.

5. Pursuant to fee agreements with various clients, Carmell Charone Widmer Mathews & Moss Ltd.'s usual and customary hourly rate for this type of case is $160.00 per hour.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 5, 1999.

FURTHER AFFIANT SAYETH NOT.

/s/ David J. Mathews
DAVID J. MATHEWS

DECLARATION OF BARBARA J. HILLMAN

I, Barbara J. Hillman, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that the following statements are true and correct and based upon my personal knowledge:

1. I received my B.A. with honors from the University of Chicago in 1963.

2. I received my J.D. from the University of Chicago in 1966.

3. I have been admitted to practice law in the State of Illinois since 1967.

4. I am a partner with the firm of Cornfield and Feldman.

5. Cornfield and Feldman regularly provides legal services for multi-employer pension funds, including the litigation of actions to recover delinquent contributions to health and welfare and pension plans pursuant to ERISA.

6. Pursuant to fee agreements with various clients, Cornfield and Feldman's usual and customary hourly rate for this type of case is $160.00 per hour.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 5, 1999.

FURTHER AFFIANT SAYETH NOT.

/s/ Barbara J. Hillman
BARBARA J. HILLMAN

DECLARATION OF JAMES P. HANLON

I, James P. Hanlon, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that the following statements are true and correct and based upon my personal knowledge:

1. I received my B.A. from DePauw University and my J.D. from Valparaiso University.

2. I have been admitted to practice law in the State of Illinois since 1996.

3. After graduating law school, I worked as an associate at Hinshaw & Culberston in Chicago from August, 1996 through August, 1997.

4. From August, 1997 through August, 1998, I served as law clerk to the Honorable Robert L. Miller, Jr., United States District Judge, Northern District of Indiana, South Bend Division.

5. I have been employed as an associate at Seyfarth, Shaw, Fairweather & Geraldson since September, 1998.

6. Pursuant to our fee arrangement with the Defendants in *Moriarty v. Svec*, Case No. 96 C 7392, my hourly rate for this case has been and continues to be $160.00.

7. Pursuant to standard operating procedures at Seyfarth, Shaw, attorneys maintain contemporaneous time records on a daily basis that are then inputted to the Firm's central time-keeping computer system.

8. I reviewed Seyfarth, Shaw's invoices sent to Defendants for legal services performed in connection with *Moriarty v. Svec*, Case No. 96 C 7392 and the appeal of that case to the Seventh Circuit. For the period of time February, 1998 through September, 1999, the Firm charged Defendants for approximately 301.35 hours of attorney time. I redacted information from those invoices that was not billed to the client for Case No. 96 C 7392 or the appeal thereof. I also

redacted information where appropriate to preserve the attorney-client privilege.

9. Other than *Moriarty v. Svec*, Case No. 96 C 7392, I have defended one other ERISA case involving the collection of delinquent contributions.

10. I reviewed the electronic data base for the United States District Court for the Northern District of Illinois, searching cases where Thomas Moriarty was the plaintiff in ERISA collections cases and the Jacobs, Burns firm was his counsel. There were no fewer than 34 such cases. Marisel Hernandez and/or David Allen were counsel of record in 15 of those cases.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 5, 1999

FURTHER AFFIANT SAYETH NOT.

/s/ James P. Hanlon
JAMES P. HANLON

DECLARATION OF DOUGLAS A. DARCH

I, Douglas A. Darch, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury that the following statements are true and correct and based upon my personal knowledge:

1. I received my B.S. from the Georgia Institute of Technology and my J.D. from the University of North Carolina.

2. I have been admitted to practice law in the State of Illinois since 1980.

3. I have been a partner at the law firm of Seyfarth, Shaw, Fairweather & Geraldson since 1988.

4. Pursuant to our fee arrangement with the Defendants in *Moriarty v. Svec*, Case No. 96 C 7392, my hourly rate for this case has been and continues to be $270.00.

5. Pursuant to standard operating procedures at Seyfarth, Shaw, attorneys maintain contemporaneous time records on a daily basis that are then inputted to the Firm's central time-keeping computer system.

6. Monthly bills are reviewed by the partner responsible for the client before the bill is sent to the client. During this review process, the billing partner exercises billing judgment by reducing time entries that appear duplicative, excessive or otherwise unnecessary and not properly billed to the client

7. I reviewed each monthly bill submitted to Defendants in *Moriarty v. Svec*, Case No. 96 C 7392. Exercising billing judgment, I trimmed time off of those bills where I found it appropriate.

8. The invoices submitted in support of Defendants' Opposition to Plaintiff's Fee Petition are true and correct copies of the invoices that were submitted to Defendants for payment. The copies have been redacted where

appropriate to excise time entries not related to *Moriarty v. Svec*, Case No. 96 C 7392, and where necessary to preserve the attorney-client privilege.

9. Other than *Moriarty v. Svec*, Case No. 96 C 7392, I have defended 3 other ERISA cases involving the collection of delinquent contributions. Other than the appeal of *Moriarty v. Svec*, Case No. 96 C 7392, I have appealed one other ERISA case involving the collection of delinquent contributions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 5, 1999.

FURTHER AFFIANT SAYETH NOT.

/s/ Douglas A. Darch
DOUGLAS A. DARCH

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF DAVID J. MATHEWS

David J. Mathews, being duly sworn, deposes and states as follows:

1. On October 5, 1999 I provided an affidavit which stated that my firm, Carmell Charone Widmer Mathews & Moss Ltd. ("Carmell Charone") concentrates in providing legal services for multi-employer benefit funds, including the litigation of ERISA actions. In addition, my firm represents a number of labor organizations.

2. As I stated in my earlier declaration, Carmell Charone's customary hourly rate to its multi-employer benefit funds clients is $160 an hour. Because of Carmell Charone's dedication to certain social causes, such as the representation of labor unions and multi-employer funds, we charge our clients far below the market rate in the Chicagoland metropolitan area. We charge these depressed rates because we believe it is the fiduciary responsibility of multi-employer benefit funds to recover delinquent contributions in the most cost-effective way so that the funds' participants can be insured that the funds' assets are being used primarily to provide participants with health and welfare and pension benefits. Consistent with our dedication to these ideals and causes, Carmell Charone charges these clients a rate that is less than could be secured by lawyers in the Chicago metropolitan region.

Further Affiant Sayeth Not.

/s/ David J. Mathews
DAVID J. MATHEWS

Dated: October 11, 1999

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF BARBARA J. HILLMAN

Barbara J. Hillman. being duly sworn, deposes and states as follows:

1. This Declaration supplements my October 5, 1999 Declaration.

2. The firm in which I am a partner, Cornfield & Feldman, concentrates in the representation of unions and multi-employer benefit funds. Consistent with its dedication to the labor movement, Cornfield & Feldman charges these clients a rate that is less than it believes could be secured by lawyers performing similar services in the Chicago metropolitan region.

Further Affiant Sayeth Not.

/s/ Barbara J. Hillman
BARBARA J. HILLMAN

Dated: October 15, 1999

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

AFFIDAVIT OF BERNARD M. BAUM

Bernard M. Baum, being duly sworn, deposes and states as follows:

1. I am an attorney licensed to practice in Illinois (1960). I am also admitted to practice in the Northern District of Illinois and before the Seventh Circuit Court of Appeals.

2. I am a partner in the law firm of Baum, Sigman, Auerbach, Pierson & Neuman, Ltd. ("Baum Sigman") located at 200 W. Adams Street, Chicago, IL. Baum Sigman is a law firm which concentrates in the representation of unions and multi-employer benefit funds. Consistent with its dedication to the labor movement, Baum Sigman charges these clients a rate that is less than could be secured by lawyers in the Chicago metropolitan region.

3. I have represented various multi-employer benefit funds in a variety of ERISA matters. Some of these ERISA matters are uncontested or do not involve the litigation of substantive issues dealing with liability. In cases in which the issues are significant and dispositive motions must be filed, or which the fund must proceed to trial. I charge my clients $270 per hour.

Further Affiant Sayeth Not.

/s/ Bernard M. Baum
BERNARD M. BAUM

Date: October 11, 1999